BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 03 – Historic Heritage and Protected Trees chapters

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CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

HEARING STREAM 03 - HISTORIC HERITAGE AND PROTECTED TREES CHAPTERS OF THE PROPOSED DISTRICT PLAN

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Greymouth Petroleum Ltd v Heritage New Zealand Pouhere Taonga

Environment Court ENV-2014-WLG-62; [2016] NZEnvC 11
21, 22, 23 September 2015; 26 January 2016
Environment Judge BP Dwyer, Commissioners DJ Bunting and SK Prime

Archaeological site — Application to modify or destroy — Appeal against decision declining application — Area having significant Maori values — Alleged burial site of significant Maori ancestor — Whether consideration of application extending to wider off-site effects or only to proposed site — Decision process — Merit of application — Cultural issues — Correctness of decision declining consent — Heritage New Zealand Pouhere Taonga Act 2014, ss 3, 4, 4(d), 5, 5(2)(e), 6, 7, 22, 39, 39(1), 40, 41, 42, 43, 44, 44(a), 45, 46, 46(2), 47, 48, 49, 49(2), 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 59(1)(a), 59(1)(a)(i), 59(1)(a)(iii), 59(1)(a)(v), 59(1)(a)(vi) and 65(3)(c) and Part 3, subparts 1, 2 and Part 4; Historic Places Act 1993; Interpretation Act 1999, ss 5(2) and 5(3); Resource Management Act 1991, s 6 and Part 6.

Greymouth Petroleum Ltd (Greymouth) appealed against a decision of Heritage New Zealand Pouhere Taonga (HNZ) declining an application by Greymouth for an authority to modify or destroy an archaeological site situated in the Waitara Valley in Taranaki. The application was made pursuant to s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014 (the Act). Greymouth's appeal to the Environment Court was made pursuant to s 58 of the Act.

The modification or destruction proposed by Greymouth was the undertaking of earthworks enabling it to establish an oil/gas well site, access way and pipeline within an area referred to by Greymouth as Kowhai D. HNZ declined the application because it considered the works proposed would impact too greatly on the integrity of Maori cultural values associated with the wider landscape where the proposed work was to occur. This included the fact that Wiremu Kingi Te Rangitake, a significant ancestor of Te Atiawa, was buried in the vicinity of the site. As matters transpired, the significance of this landscape was reinforced by subsequent information relating to Pukerangiora and other burials nearby. An important part of HNZ's decision was its view that it was able – indeed obliged – to take account of the cultural values associated with the wider

landscape of the site, rather than simply the values attaching to any particular archaeological site that might be physically damaged during the work.

HNZ argued that when regard was had to the purpose of the s 3 of the Act its principles (including s 4(d)) and its responsibility to give effect to s 7 of the Treaty of Waitangi it was appropriate for HNZ to take a wider perspective of an application than just consideration of its impacts on the archaeological site itself and that the location of such site within a landscape of significant importance to Maori might well justify declining an application.

Greymouth submitted that in determining an application pursuant to s 44(a) of the Act, HNZ's considerations were limited to those relating to effects of the proposal on the archaeological site which an applicant sought to modify or destroy and did not extend to consideration of wider off site effects, in this case non-physical effects on the contended grave site of Wiremu Kingi. There was no evidence that Kowhai D was in fact an archaeological site. The application was made on a precautionary basis to cover the possibility that archaeological material might be found during excavations. The grave site of Wiremu Kingi was not part of the specified area of land which Greymouth sought authority to modify or destroy.

Held: (allowing the appeal)

(1) It was abundantly clear from the provisions in Part 3 subpart 2 of the Act that the sections of the Act under consideration were directed at the protection of archaeological sites themselves and not wider areas beyond them. It was correct that the matters identified in s 59(1)(a) of the Act which might be considered when determining an application under s 44 were very wide in scope but they were clearly matters which applied to the archaeological site in respect of which an application had been made. Of particular significance in this regard were the provisions of s 59(1)(a)(i) which addressed the cultural matters of particular concern to HNZ in this case. It was clear from perusal of this provision that it was the cultural heritage value of the archaeological site itself and the factors which justified the protection of that archaeological site which were the issues under consideration (see [38], [39]).

(2) In determining the applications under s 44, HNZ and the Council were acting in a judicial or semi-judicial capacity. In doing so they were obliged to act fairly and in accordance with the rules of natural justice. The failure to refer the staff reports delaying a decision and advocating a particular outcome without reference to Greymouth for its consideration and comment did not meet the required standard (see [49]).

(3) While the site might possibly be the final resting place of Wiremu Kingi it was not known with the degree of confidence required to make a positive finding to that extent. That finding of itself meant that the Greymouth appeal should succeed. Further, Mr Doorbar's refusal to disclose the precise location of the burial site, while understandable, made the case more difficult to prove (see [72], [73]).

(4) It was apparent from the evidence that it was the mere presence of a drilling operation at Kowhai D and the knowledge of that presence which were the matters at issue in this case. The views of Mr Doorbar and

Mrs Belton as to the inappropriateness of the activities in this case had been forcefully expressed. In reality they sought a right of veto over activities in the vicinity of, but not within, their cultural sites. In deciding whether or not to grant an authority to Greymouth it was reasonable to balance the cultural considerations with the facts that: Greymouth's proposal did not involve any unacceptable disturbance or destruction of Kowhai D itself; Kowhai D was situated somewhere between 300–500 m away from the cultural sites in question; operations on Kowhai D would have no discernible physical effects on the cultural sites in question; Kowhai D's proposal was to undertake a lawful use of land which was authorised pursuant to the exploration and mining permits which it held (see [95], [96], [97]).

Appeal

The appellant appealed under s 58 of the Heritage New Zealand Pouhere Taonga Act 2014 against a decision of the respondent declining an application by the appellant pursuant to s 44(a) of the Act.

LJ Taylor QC and *GM Richards* for the appellant.
TJ Gilbert and *SWP Woods* for the respondent.

ENVIRONMENT JUDGE DWYER, COMMISSIONERS BUNTING AND PRIME.

Introduction

[1] Greymouth Petroleum Ltd (Greymouth) appeals against a decision of Heritage New Zealand Pouhere Taonga (HNZ) declining an application by Greymouth pursuant to s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014 (the Act) for an authority to modify or destroy an archaeological site situated in the Waitara Valley in Taranaki.

[2] Greymouth's appeal to this Court was made pursuant to s 58 of the Act. At the outset of the hearing we expressed our view that this appeal should proceed on the basis of a de novo hearing consistent with appeals under Resource Management Act from consent authority decisions. Both parties agreed that to be the case.

[3] The modification or destruction proposed by Greymouth was the undertaking of earthworks enabling it to establish an oil/gas well site, access way and pipeline within an area described in the HNZ decision and notice of appeal as ... *land at 17 Maunganui Road, Lepperton/Inglewood; 4621 and 59 Tikorangi Road West, Tikorangi and 547 Ngatimaru Road, Tikorangi*. We will describe the site more fully later in this decision, however it was referred to by Greymouth as *Kowhai D* and that is how we shall refer to it in this decision.

[4] The crux of the HNZ decision to decline Greymouth's application is found in the following paragraphs of the decision which record as follows:

> It is the decision of Heritage New Zealand Pouhere Taonga that your application be declined. Heritage New Zealand Pouhere Taonga and tangata whenua are in agreement that the area has significant Maori values that

> warrant protection. It is not considered possible to adequately offset the adverse effects of the proposal.
>
> Otaraua have informed Heritage New Zealand that Wiremu Kingi Te Rangitake[1], a significant ancestor of Te Atiawa, is buried in the Waitara Valley. Although the proposed development will not directly impact on the burial site, the values associated with this site are considered so important that any development in the area will impact on the integrity of the cultural values.

The *Otaraua* referred to is Otaraua Hapu (Otaraua) which is one of four Northern Taranaki Iwi collectively known as Te Atiawa Nui Tonu. Otaraua was not a separate party to these proceedings but a representative of the hapu (Mr DE Doorbar) appeared as a witness for HNZ at our hearing. The other hapu with an interest in the area is Pukerangiora Hapu.

Background

[5] Greymouth is in the business of oil and gas production in the Taranaki area. It holds a number of mining and exploration permits in Taranaki including a permit for the Kowhai area in the vicinity of Waitara. Kowhai D is situated on privately owned farmland[2] on the south-eastern bank of the Waitara River approximately 10 km up from the Waitara River mouth.

[6] Establishment of the well site requires the construction of an access track (partly on an existing farm track) some 800–1000 m or so in length from Maunganui Road to Kowhai D. On site earthworks will involve stripping the topsoil on the site together with cutting and filling to create a platform for well activities. The well site will be surrounded by a bund. A narrow trench would be dug through farmland to contain a pipeline connecting Kowhai D to an existing production station (Kowhai A) on the north side of the river. Once the pipes were installed the trench would be backfilled and reinstated in pasture.

[7] The well site itself has approximate dimensions of 216 m long by 82 m wide (slightly more if measured outside the bund). The bulk of the site (approximately 1.5 ha) would take the form of a metalled surface with the well structures themselves occupying only a small footprint towards one end of the site. Information provided as part of Greymouth's application indicates that construction of the facilities which we have described would require the following volumes of earthworks:

- Roading – 27,800m^3;
- Well site/pad – 4,300m^3;
- Pipeline – 3,360m^3.

[8] The permanent structures on the well site once construction is completed are limited in extent. They were shown in a photographic attachment to the evidence of TR Dickey (Ms Dickey) (Greymouth's Consenting and Land Manager). The Court visited a comparable well site and viewed a working well to gain some appreciation of the structures.

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1 Some witnesses referred to Wiremu Kingi Te Rangitake in their evidence and some to Wiremu Kingi Te Rangitaake. We have used the latter spelling.

2 Greymouth has negotiated occupancy rights for Kowhai D.

The wellhead itself is situated underground in a concrete cellar approximately 1.5 m square in area and two metres deep. A metal and pipe structure called a *Christmas tree* sits inside the cellar and protrudes above the ground approximately two metres. A bunded flare pit is situated at one end of the site just outside of the main bund as a safety measure. The flare pit occupies an area of approximately 10 m square by three metres deep.

[9] The most substantial structure associated with Greymouth's operation is the drilling rig which would be in place for well testing and construction. This is a large structure some 30 m high. It is the need to accommodate the drilling rig and other structures associated with the drilling process that primarily require the site to be the size that it is. If the well is constructed as a vertical well the rig would be on site somewhere between six or seven weeks. If directional drilling away from vertical alignment is required to establish the well then several weeks could be added on to that timeframe. The presence of the rig would obviously indicate that a significant drilling operation was being undertaken on the site for a period likely to be somewhere between six weeks and three months.

[10] Greymouth is very familiar with the processes involved in locating and establishing well sites. These processes, including the rationale for selecting Kowhai D, were described in some detail in Ms Dickey's evidence.

[11] As part of its investigation of Kowhai D, Greymouth sought the assistance of BTW Company (BTW), a surveying and planning firm, by way of a feasibility report on the well site. The July 2012 report received from BTW[3] identified (inter alia) a range of resource consents which might be required for a well on the site and also contained the following advice:

- Archaeological authority may be required to destroy/damage/modify unidentified archaeological remains.
- It is recommended that an archaeological investigation be undertaken to ascertain the likely presence of archaeological remains and advise on whether there is a requirement to obtain an archaeological authority. The site is located within an area of known archaeology and Maori habitation.

[12] In July 2014 Greymouth obtained an archaeological assessment of Kowhai D and its related works from ID Bruce (Mr Bruce) (a consultant archaeologist). Mr Bruce's report was included in the application which Greymouth lodged with HNZ for an authority to undertake earthworks in September 2014. It came into the Court as part of Mr Bruce's brief of evidence. The survey took the form of review of archaeological records and literature, inspection of aerial photographs, historic land plans and geological maps together with a walkover of the project area. None of the investigation established the presence of any archaeological sites or archaeological material in the areas of development proposed by Greymouth. Notwithstanding that, Mr Bruce's report contained the following recommendation:[4]

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3 Dickey EIC, Appendix B.
4 Paragraph 13.1.

> It is recommended that all earthworks undertaken as part of the construction of Kowhai D Well Site and pipeline to the Kowhai Production Station are undertaken under a general authority from Heritage New Zealand Pouhere Taonga. This authority is intended as a precautionary measure in the event that unrecorded archaeological evidence is encountered during this earthwork.

We understand that application for a general authority is common practice in Taranaki even if no known archaeological sites are present in a development area, because of Taranaki's rich Maori heritage and the possibility of cultural material being unearthed at any time.

[13] Although Mr Bruce's investigations found no archaeological sites or materials in the areas proposed for development, his report identified the significance to Maori of the wider area and the presence of pa sites and other features of significance in the vicinity. In the section of his report dealing with iwi consultation Mr Bruce recorded the following:[5]

> The representatives of Otaraua Hapu consider the area of the proposed well site to be of a high cultural value. David Doorbar has stated that a significant individual was secretly buried in the general vicinity of the well site.
>
> Mr Doorbar has stated that while the burial is not situated on the area of the well site footprint, they consider the development of this well site so close to a Waahi Tapu is not culturally appropriate. Mr Doorbar considers the information pertaining to the individual and whereabouts of his interment to be confidential and do not wish to disclose this information publically at this time.

The *significant individual* concerned is Wiremu Kingi Te Rangitaake (Wiremu Kingi). Mr Doorbar would not disclose the precise position of the burial site but said that it is within a radius of approximately 300 m (or closer) from Kowhai D.[6] It is the contended presence of that burial site which was central to HNZ's decision on Greymouth's application and to the position it adopted in these proceedings. We will return to more detail in that regard in due course.

[14] In addition to the evidence of Mr Bruce the Court also received archaeological evidence from PJ Bain (Ms Bain), Senior Archaeologist for HNZ. Ms Bain did not take issue with Mr Bruce's archaeological assessment of the site. Appendix D to Ms Bain's evidence was a report on the application prepared by HNZ staff which described the possibility of locating archaeological material on Kowhai D as ... *low*. She acknowledged that if the issue of disturbance to Kowhai D was ... *all there was to this case, the authority may well have been granted with standard conditions in place to try and mitigate adverse effects and record any archaeological sites encountered.*[7] Ms Bain went on to testify that ... *from a Maori perspective, the wider area was assessed as having a very high value because of the broader cultural landscape within which the work was to occur.*[8]

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5 Paragraph 9.3.
6 Doorbar EIC at para 14.9.
7 Bain EIC at para 6.6.
8 Bain EIC at para 6.7.

[15] The evidence of Dr Bruce and Ms Bain came into the Court by consent and neither was required for cross-examination. There was no concern in these proceedings that the works proposed by Greymouth are likely to cause physical modification or destruction to archaeological material within Kowhai D (including its related access track and pipeline) of a nature that it would be inappropriate for an authority to be issued by HNZ.

[16] Although the *Maori values or cultural values* referred to in the HNZ decision related to the contended burial place of Wiremu Kingi, HNZ sought to bring into play wider Maori or cultural issues pertaining to the vicinity in its case to the Court. The Waitara Valley was historically an area of intensive Maori activity and occupation with three pa sites in elevated positions within a kilometre or so of Kowhai D. One of those pas, the Pukerangiora Pa, was besieged and sacked by Waikato Maori in the early 1830s with great loss of life (in excess of 1000 people). Evidence on these matters was given to the Court by Mrs R Belton, a kaumatua of Pukerangiora Hapu. We will again return to that matter later in this decision however nothing in the evidence which we heard established that these events (including any related burials) took place on Kowhai D or indeed within its immediate proximity.

[17] It will be apparent from consideration of [4], [14] and [15] (above) that the reason for decline of Greymouth's application (and for the position which HNZ adopted in this appeal) was nothing to do with any modification or destruction which might be occasioned by well drilling activities on Kowhai D itself. The HNZ decision referred to protection of an area with significant Maori values which warranted protection, referring to the contended burial site of Wiremu Kingi. In her evidence, Ms Bain took a somewhat wider view and referred to the ... *broader cultural landscape within which the work was to occur*.

[18] Those considerations led to Greymouth advancing the *primary position* in support of its appeal ... *that its application should not have been declined on the ground that the burial site of Wiremu Kingi is in the vicinity of the proposed activities. That is because Greymouth's proposed activities, in HNZ's own words, "will not directly impact on the burial site"*.[9]

Greymouth's case was that in determining an application pursuant to s 44(a) of the Act, HNZ's considerations are limited to those relating to effects of the proposal on the archaeological site which an applicant sought to modify or destroy and did not extend to consideration of wider off site effects, in this case non physical effects on the contended grave site of Wiremu Kingi.

[19] HNZ's position in respect of that proposition is found in its opening submissions in these terms:

> 3. In short, HNZ declined the application because it considered the works proposed would impact too greatly on the integrity of Maori cultural values associated with the wider landscape where the proposed work was to occur. This included the fact that a very significant ancestor of

9 Greymouth opening submissions at para 8.

Te Atiawa is buried in the vicinity of the Site. As matters have transpired, the significance of this landscape has been reinforced by subsequent information relating to Pukerangiora and other burials nearby.

4. An important part of HNZ's decision was its view that it was able – indeed obliged – to take account of the cultural values associated with the wider landscape of the Site, rather than simply the values attaching to any particular archaeological site that might be physically damaged during the work.

HNZ conceded that if its interpretation was incorrect it must lose this appeal. It contended that this question was a matter of statutory interpretation. We agree with that.

[20] In the following section of this decision we deal with interpretation of the Act including consideration of the jurisdictional issue raised by Greymouth's primary position. We will then consider the merits of the appeal.

The Heritage New Zealand Pouhere Taonga Act 2014

[21] The Act came into force in New Zealand on 19 May 2014. Its purpose is to ... *promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.*[10] It repealed and replaced the Historic Places Act 1993.

[22] The Act enshrines the following principles:

> **4. Principles** — All persons performing functions and exercising powers under this Act must recognise —
>
> (a) the principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
>
> (b) the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should —
>
> (i) take account of all relevant cultural values, knowledge, and disciplines; and
>
> (ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
>
> (iii) safeguard the options of present and future generations; and
>
> (iv) be fully researched, documented, and recorded, where culturally appropriate; and
>
> (c) the principle that there is value in central government agencies, local authorities, corporations, societies, tangata whenua, and individuals working collaboratively in respect of New Zealand's historical and cultural heritage; and
>
> (d) the relationships of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tupuna, wahi tapu, and other taonga.

It will be seen that (inter alia) the Act requires persons exercising powers under it to take account of relevant cultural values and knowledge together with relationships of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tupuna, wahi tapu and other taonga.

[23] Section 5 provides a guide to the overall scheme of the Act. Although it repeals the Historic Places Act it continues many of the

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10 Section 3 of the Heritage New Zealand Pouhere Taonga Act 2014.

features of that legislation including prohibition of ... *the modification or destruction of an archaeological site unless an authority for the modification or destruction is obtained from Heritage New Zealand Pouhere Taonga under this Act;*[11]

[24] The Act also continued the existence of two bodies established under the Historic Places Act namely the New Zealand Historic Places Trust (which has become HNZ) and the Maori Heritage Council (the Council) being a body which (inter alia) acts in an advisory capacity to HNZ. Section 22 of the Act provides that certain functions, (including the determination of applications for authorities under s 44) may be delegated to the Council. It was in fact the Council which determined the Greymouth application.

[25] Part 3 of the Act contains provisions for the ... *Protection of places and areas of historical and cultural value*. For the purposes of our considerations the relevant parts of Part 3 are Subparts 1 and 2.

[26] Subpart 1 of Part 3 contains provision for heritage covenants in ss 39–41. Section 39 provides that:

> **39. Heritage covenants** — (1) Heritage New Zealand Pouhere Taonga may enter into a heritage covenant with the owner of a historic place, historic area, wahi tupuna, wahi tapu, or wahi tapu area to provide for the protection, conservation, and maintenance of the place, area, wahi tupuna, wahi tapu, or wahi tapu area.
>
> ...

[27] It will be seen that s 39(1) includes reference to (inter alia) a *historic place* and a *historic area*. These places and areas are defined in s 6 of the Act in the following terms:

> **6. Interpretation** —
>
> ...
>
> *historic area* means an area of land that —
>
> (a) contains an inter-related group of historic places; and
>
> (b) forms part of the historical and cultural heritage of New Zealand; and
>
> (c) lies within the territorial limits of New Zealand
>
> *historic place* —
>
> (a) means any of the following that forms part of the historical and cultural heritage of New Zealand and that lies within the territorial limits of New Zealand:
>
> (i) land, including an archaeological site or part of an archaeological site:
>
> (ii) a building or structure (or part of a building or structure):
>
> (iii) any combination of land, buildings, structures, or associated buildings or structures (or parts of buildings, structures, or associated buildings or structures); and
>
> (b) includes any thing that is in or fixed to land described in paragraph (a)
>
> ...

We think that these provisions are significant in our considerations because they make a distinction between individual historic places (which can include archaeological sites) and wider historic areas.

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11 Section 5(2)(e).

[28] Subpart 2 of Part 3 then contains provisions relating to ... *Overarching protection for archaeological sites*. Archaeological sites are defined in s 6 as meaning:

> **6. Interpretation** —
> *archaeological site* means, subject to section 42(3), —
> (a) any place in New Zealand, including any building or structure (or part of a building or structure), that —
> (i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and
> (ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and
> (b) includes a site for which a declaration is made under section 43(1)
> ...

[29] Section 42 of the Act contains the following provision for the protection of archaeological sites:

> **42. Archaeological sites not to be modified or destroyed** —
> (1) Unless an authority is granted under section 48, 56(1)(b), or 62 in respect of an archaeological site, no person may modify or destroy, or cause to be modified or destroyed, the whole or any part of that site if that person knows, or ought reasonably to have suspected, that the site is an archaeological site.
> ...

An *authority* is defined by s 6 as meaning ... *an authority granted by Heritage New Zealand Pouhere Taonga under s 48, 56, or 62 to undertake an activity that will or may modify or destroy 1 or more archaeological sites.*

[30] Greymouth's application to HNZ for an authority was made pursuant to s 44 of the Act which enables any person to make:

> **44. Applications for authorities** —
> (a) an application for an authority to undertake an activity that will or may modify or destroy the whole or any part of any archaeological site or sites within a specified area of land, whether or not a site is a recorded archaeological site or is entered on the New Zealand Heritage List/Rarangi Korero or on the Landmarks list.
> ...

[31] As we observed previously, there is no evidence that Kowhai D is in fact an archaeological site. It may prove not to be. The application was made on a precautionary basis to cover the possibility that archaeological material might be found during excavations. Authorities granted pursuant to such applications are known as *general authorities* in that they cover sites which have not been specifically identified as archaeological sites. We further observe that the grave site of Wiremu Kingi is not part of the *specified area of land* which Greymouth sought authority to modify or destroy. Although it is not known by Greymouth or its advisors precisely where the grave site might be, it is not on Kowhai D nor will it be physically impacted by any works associated with Kowhai D.

[32] HNZ contended that when considering an application for an authority its considerations were not limited to the impact of works on any archaeological site but extended to consideration of damage to wider *Maori sites*[12] which might be impacted by the proposed work. It submitted that:[13]

> In a sense, the presence or potential presence of an "archaeological site" provides a jurisdictional threshold. Once crossed (as it was in this case evidenced by the fact of the application for an authority by Greymouth), HNZ should not, and indeed must not, confine its considerations strictly to the impact on any "archaeological site". Its focus broadens.

Mr Gilbert came back to this point on a number of occasions in his oral submissions. He contended that once HNZ was seized of jurisdiction it ... *should not and must not confine its consideration to simply looking at what is dug out of the ground. Its focus broadens.*[14] He questioned how HNZ and the Maori Heritage Council could discharge their roles with a bicultural view if ... *when the Maori Heritage Council is making a decision about an archaeological site all it does is look down at what is dug up, without looking up at what's around ...*[15]

[33] In support of these propositions, Mr Gilbert referred to the provisions of s 59 of the Act which sets out the specific matters which both HNZ and the Court must take into account in determining applications for authorities and/or appeals from decisions on such applications. (Section 59 identifies the matters for consideration by the Court when considering an appeal from a decision of HNZ but the same matters are also the matters for consideration by HNZ.[16]) It relevantly provides as follows:

> **59. Decision on appeal** — (1) In determining an appeal made under section 58, the Environment Court —
>
> (a) must, in respect of a decision made on an application made under section 44, have regard to any matter it considers appropriate, including —
>
> (i) the historical and cultural heritage value of the archaeological site and any other factors justifying the protection of the site:
>
> (ii) the purpose and principles of this Act:
>
> (iii) the extent to which protection of the archaeological site prevents or restricts the existing or reasonable future use of the site for any lawful purpose:
>
> (iv) the interests of any person directly affected by the decision of Heritage New Zealand Pouhere Taonga:
>
> (v) a statutory acknowledgment that relates to the archaeological site or sites concerned:
>
> (vi) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tupuna, wahi tapu, and other taonga;
>
> ...

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12 HNZ opening submissions at para 39.
13 HNZ opening submissions at para 40.
14 NOE, page 128.
15 NOE, page 129.
16 Section 49(2).

[34] HNZ contended that when regard is had to the purpose of the Act (s 3) its principles (including s 4(d)) and its responsibility to give effect to the Treaty of Waitangi (s 7) it was appropriate for HNZ to take a wider perspective of an application than just consideration of its impacts on the archaeological site itself and that the location of such sites ... *within a landscape of significant importance to Maori might well justify declining an application.*[17] We consider those contentions in light of the provisions of the Act as we understand them.

[35] First we observe that the application under consideration by either HNZ or the Court pursuant to s 59 is an application *made under s 44*. Both ss 44 and 59 are contained in Subpart 2 of Part 3 which is headed – *Archaeological sites* and then sub-headed – *Overarching protection for archaeological sites*. We consider that is a clear indication as to the matter to which the provisions of ss 42–59 of the Act are directed,[18] namely archaeological sites and their overarching protection.

[36] That proposition is apparent from consideration of the commencing provision of Subpart 2 of Part 3, s 42 (previously cited – para 29 above) which provides that unless an authority is granted ... *in respect of an archaeological site, no person may modify or destroy, or cause to be modified or destroyed, the whole or any part of that site, if that person knows or ought reasonably to have suspected, that the site is an archaeological site.* (Our emphases). Again, these provisions make it clear that the matter under consideration is archaeological sites which persons propose to modify or destroy rather than wider areas.

[37] The fact that the matter which is before HNZ for consideration pursuant to s 44 is effects of the proposal on an archaeological site itself is confirmed by the provisions of s 46 of the Act which specify the information which must be provided with an application for an authority under s 44. Section 46(2) relevantly provides as follows:

> **46. Information that must be provided with application for authority —**
>
> ...
>
> (2) An application must include the following information:
>
> ...
>
> (d) a description of *each archaeological site* to which the application relates and the location of *each site*; and
>
> ...
>
> (f) a description of how the proposed activity will *modify or destroy each archaeological site*;
>
> (g) except in the case of an application made under section 44(b), assessment of —
>
> (i) the archaeological, Maori, and other relevant values *of the archaeological site* in the detail that is appropriate to the scale and significance of the proposed activity and the proposed modification or destruction *of the archaeological site*; and
>
> (ii) *the effect of the proposed activity on those values*; (that is the archaeological, Maori, and other relevant values of the archaeological site).

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17 HNZ opening submissions at para 54.

18 Section 5(2) and (3) of the Interpretation Act 1999.

...

(Our emphases in each case).

[38] We consider that it is abundantly clear from these provisions that the sections of the Act under consideration are directed at the protection of archaeological sites themselves and not wider areas beyond them. It is correct that the matters identified in s 59(1)(a) of the Act which might be considered when determining an application under s 44 are very wide in scope but they are clearly matters which must apply to the archaeological site in respect of which an application has been made. Sections 59(1)(a)(i), (iii) and (v) specifically state that.

[39] Of particular significance in this regard are the provisions of s 59(1)(a)(i) which address the cultural matters of particular concern to HNZ in this case. It is clear from perusal of this provision that it is the cultural heritage value of the archaeological site itself and the factors which justify the protection of *that* archaeological site which are the issues under consideration.

[40] We concur with the observation made on Greymouth's behalf that if HNZ's interpretation is correct and ... *an application is made for an authority to HNZ for the hypothetical earthworks then Pandora's box is opened, and HNZ can use the application to protect other sites or places of interest to Maori which exist, or are alleged to exist, within the "broader cultural landscape"*. In our view such an interpretation is clearly inconsistent with the provisions of Subpart 2 of Part 3 which are directly aimed at the protection of archaeological sites.

[41] Concerns raised by HNZ as to effects on the broader cultural landscape (whatever that might be) are addressed in Part 4 of the Act which provides for ... *Recognition of places of historical, cultural, and ancestral significance.* Part 4 provides for the continuation and maintenance of the New Zealand Heritage List/Rarangi Korero which (inter alia) is ... *to be a source of information about historic places, historic areas, wahi tupuna, wahi tapu, and wahi tapu areas for the purposes of the Resource Management Act 1991*.[19]

[42] We concur with the submission made by Mr Taylor QC on behalf of Greymouth that the schemes of the Act and RMA are clearly that:

- HNZ regulates physical interference by modification or destruction of archaeological sites under the Act.
- Local authorities regulate land use through the use of local planning instruments including any other form of interference with archaeological sites.
- HNZ can have a role in local authority processes under RMA as a heritage protection authority (including by way of the New Zealand Heritage List/Rarangi Korero) and/or by way of the use of heritage orders under RMA.

[43] Having regard to all of these considerations we find that the purpose of Subpart 2 of Part 3 of the Act is to protect the physical integrity

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19 Section 65(3)(c).

of archaeological sites which persons seek to modify or destroy, not to protect the wider cultural landscape. Accordingly we determine that HNZ was not correct in determining Greymouth's application on the basis of the contended effect which it might have on the wider landscape surrounding the archaeological site which Greymouth sought authority to modify. HNZ acknowledged such a finding must be determinative of the outcome of this appeal in Greymouth's favour. However in the event that we might be considered to be wrong in that interpretation we will proceed to consider the application on its merits. Before doing so however there is an issue arising out of the process under the Act on which we must comment.

[44] That matter relates to the way in which Greymouth's application was processed by HNZ. The Act is notably brief in the provisions which it contains as to the manner in which HNZ must process applications for authorities. The Act contains no notification requirements, provisions for participation of other parties or hearings provisions such as those contained in Part 6 of the Resource Management Act for example. It is apparent that the Act seeks to establish a simple, timely and cost effective process for dealing with applications under s 44. The Council has established a process for determining applications depending on their level (Levels A–C) of significance. Greymouth's application was determined as falling into the most significant category requiring consideration by the full Council.

[45] In this instance, after receipt of Greymouth's application, HNZ staff undertook an extensive process of engagement with representatives of Otaraua Hapu (which opposed the application) and Pukerangiora Hapu (which initially did not and had provided Greymouth with a letter saying so). The extent of that engagement was described in the evidence of Ms Bain and in the evidence and cross-examination of Mr TK Teira (Kaihautu Maori for HNZ). Reports as to the outcome of this process were provided by HNZ staff to the Council. They were Appendices D (previously referred to) and F of Ms Bain's evidence.

[46] Appendix D was the initial report made to the Council which was due to hear the application in October 2014. It contains the following statements:

> 46. David Doorbar believes that the reason that Pukerangiora have Hapu (sic) accepted the proposed development is because they do not know their own history or the significance of the area and the burial of Wiremu Kingi Te Rangitake. Once he has explained the history and significance of the area he believes that Pukerangiora will change their position on the proposal.
> 47. Heritage New Zealand Pouhere Taonga does not believe that a decision can be made on the application until David Doorbar has engaged with Pukerangiora Hapu and their opinions on the matter are expressed as it is possible that Pukerangiora Hapu may change their opinion on the development.

The Council deferred a decision on the application in accordance with that recommendation.

[47] Appendix F was the final staff recommendation. There is no mention in that document as to any change of position by Pukerangiora.

The report recommended that the application be declined for the reasons summarised in the decision to which we have previously referred, made by the Council and issued by HNZ.

[48] There are two disturbing aspects of this process:

- The first is the decision to delay making a decision on the Greymouth application to give Mr Doorbar an opportunity to try and influence the position of Pukerangiora on the proposed development.
- The second is that the decision of the Council to decline consent was on the basis of the staff report uncritically accepting the information provided by Mr Doorbar and the recommendation contained in that report to decline the application on the basis of off site effects.

Greymouth was not made aware of the contents of either of these reports prior to the decision being made. It did not know that HNZ staff had allowed time for Mr Doorbar to try and influence the position of Pukerangiora which calls into question the impartiality of the process. It did not know that the recommendation was to decline the application because of the contended presence of Wiremu Kingi's burial site ... *somewhere in the [Waitara] valley*[20] nor that staff had recommended the decline of the application on the basis of considerations extending beyond the impact of its proposal on the archaeological values of Kowhai D. It was surely entitled to know about and be given the opportunity to respond to those things.

[49] We consider that was an entirely unsatisfactory situation. In determining the applications under s 44, HNZ and the Council are acting in a judicial or semi-judicial capacity. In doing so they are obliged to act fairly and in accordance with the rules of natural justice. In our view the failure to refer the staff reports delaying a decision and advocating a particular outcome without reference to Greymouth for its consideration and comment do not meet the required standard. Obviously any shortcomings in that regard will be rectified at this hearing but these are fundamental failings in fair process which we consider should have been avoided.

Merits

[50] Those findings bring us to consider the merits of the Greymouth proposal. As we noted previously, Greymouth's primary argument related to the jurisdictional issue which we addressed above. However, it identified the following alternative issue on appeal namely:[21]

> In the alternative, Greymouth says that if HNZ is entitled to seek to protect archaeological sites which will not be physically modified or destroyed when considering an application under s 44, the decision of HNZ in the instant case was unreasonable and cannot be justified when proper regard is had to the criteria in s 59 of the Act.

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20 Appendix F at para 32.
21 Greymouth opening submissions at para 7.

[51] HNZ put things slightly differently in its opening submission where it identified three *critical questions*[22] for identification. The first of these was the jurisdictional matter which we have discussed above. The next two critical questions were:

- Second, is the Court satisfied that Wiremu Kingi Te Rangitake (and/or Pukerangiora tupuna) lie (sic) nearby? This is a factual question. The key evidence comes from David Doorbar and Rae Belton, with contextual support from Te Kenehi Teira and Aroha Chamberlain on the one side and Buddy Mikaere on the other.
- Third, if the answer to the first two questions is "yes", was the decision to decline the authority in the circumstances of this case correct? This is mixed question of fact and law.

We will deal these remaining matters as identified by HNZ.

Cultural issues

[52] We put the first remaining matter under the description of cultural issues. Because these expanded beyond just the burial site of Wiremu Kingi we deal with it under two heads:

- First, issues arising out of the contended burial of Wiremu Kingi.
- Second, issues arising out of the sack of Pukerangiora Pa and the slaughter of its inhabitants.

Wiremu Kingi

[53] HNZ's primary witness as to the burial site of Wiremu Kingi was Mr Doorbar. He is a trustee of Manukorihi, has been chairman of Otaraua Hapu since 1995 and is involved in a number of other community groups assisting the environment, youth and the Courts.

[54] Wiremu Kingi Te Rangitaake was a renowned Te Atiawa leader born in the late 18th century at Manukorihi Pa. A great deal of his lifetime was spent in opposing land sales to the Crown and settlers in the Taranaki region – especially the Waitara Valley. Although he opposed land sales he promoted peace and unity between the races and gave significant assistance to pakeha communities in a number of ways. He was a signatory to the Treaty of Waitangi. There is no doubt that he was a highly significant figure in 19th Century Taranaki and New Zealand history. Mr Doorbar doubted that there has been a rangatira of equal status to him in Waitara since his death.

[55] Wiremu Kingi died at Kaingaru on 13 January 1882 in his 90s. At the time of his death he was cared for by Mr Doorbar's ancestor Hakopa Te Moana and his son Ngaupaka Kaingaru who was Mr Doorbar's great great grandfather. Mr Doorbar testified that on his death Wiremu Kingi was initially buried by Hakopa and Ngaupaka at Kaingaru Kainga and was then later reburied at the site currently under contention. Mr Doorbar said that shortly before his death in 1936 Ngaupaka passed the information about the final burial place of Wiremu Kingi onto his mokopuna (grandson) Te Wawaro Ngatai and left him with

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22 HNZ opening submissions at para 5.

the responsibility of looking after Wiremu Kingi. Te Wawaro was Mr Doorbar's grandfather.

[56] In turn Te Wawaro passed this knowledge on to Mr Doorbar in 1992 immediately after Te Wawaro had discharged himself from hospital and the night before he had a massive stroke, after which he could not communicate. That is the source of Mr Doorbar's knowledge as to Wiremu Kingi's final resting place.

[57] Mr Doorbar lamented the difficulties experienced by Otaraua in dealing with energy companies, their lawyers and councils over many years when trying to protect their whenua, awa and wahi tapu. He contended that the Todd family stood out among the oil companies as having ... *personally invested in a meaningful relationship with our Hapu; they go out of their way, without talking about cost, to avoid our old places*[23] but described Otaraua's experiences generally in dealing with these matters as a ... *difficult and belittling ride*.[24]

[58] During the Court's site visit of 29 September 2015, Mr Doorbar pointed out to members of the Court and others present the site of the Kaingaru Kainga and the approximate/general area where Wiremu Kingi had been reinterred which he estimated to be within 300 m or so of Kowhai D.

[59] As we noted earlier, Mr Teira gave evidence on behalf of HNZ as to matters of process in respect of the Greymouth application. He accepted and supported Mr Doorbar's evidence that ... *the burial site of the rangatira Wiremu Kingi Te Rangitake was in such proximity, that the proposed well head was offensive* ...[25] He referred to the validity of oral tradition within Maoridom[26] and endorsed Mr Doorbar's assertion of where Wiremu Kingi had been reinterred in the absence of written documentation. He told us that ... *there have been many chiefs that have been buried in secret burial sites for various reasons* ...[27] and that even when chiefs had been buried in marked graves in Christian cemeteries the remains were often removed to secret locations at night.[28]

[60] Mr Teira referred to a letter written by Mr K Trinder (chairman of Pukerangiora Hapu) in support of Greymouth's application, describing the letter as *neutral*,[29] and suggested that Pukerangiora thought the authority would be granted and did not want to bear the financial burden of opposing the application.

[61] Mr Teira stated that the Council rarely declined an archaeological authority and that to his knowledge this is the first case where an authority has been declined on the basis of wider cultural values of the landscape.[30] He gave a brief summary of the practice of *hahunga* [31] whereby deceased persons were left to lie in a place while natural processes took their course and were subsequently reinterred at a different

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23 Doorbar EIC at para 5.6.
24 Doorbar EIC at para 5.7.
25 Teira EIC at para 4.3.
26 Teira EIC at paras 5.2–5.4, 6.8–6.12.
27 Teira EIC at para 5.19.
28 Teira EIC at paras 5.20–5.22.
29 Teira EIC at para 4.5.
30 Teira EIC at para 5.17.
31 Teira EIC at paras 5.23–5.24.

burial place. In response to a question from the Court he advised that hahunga was common practice in the Taranaki area,[32] something which was confirmed by Mr Doorbar.[33]

[62] A further witness for HNZ on these matters was A Chamberlain (Ms Chamberlain) who was not examined by any Counsel and whose evidence was entered by consent. She is the Iwi Relations Manager for the New Plymouth District Council. Her role is ... *to provide direction, advice and support to Council on managing and improving relationships with tangata whenua and to provide advice and support to whanau, hapu, iwi and Maori to contribute to the decision-making processes of Council ...*[34]

[63] Ms Chamberlain described Wiremu Kingi as ... *arguably one of the most important and influential chiefs within Taranaki of his time. He was a significant rangatira of Te Atiawa and leader of his people. He is remembered in oral histories, waiata (song) and haka, and in carvings such as the one on the main pou or pole in Te Ikaroa a Maui wharenui at Owae Marae in Waitara ...*[35]

[64] Ms Chamberlain said that she dealt with Mr Doorbar on a number of occasions. She found him to be a strong advocate and took what he said seriously. Ms Chamberlain did not doubt that Mr Doorbar was genuine in his beliefs as he was ... *brought up with the old people and in my view he would not just invent something like this.*[36] She said that there was *no question* that Mr Doorbar had discussed Wiremu Kingi's burial site with her *on at least three specific occasions between 2010 and 2012*.[37]

[65] The main witness for Greymouth on cultural issues was B Mikaere (Mr Mikaere), a professional historian with a long list of publications on Maori history. He is an experienced researcher who has produced reports for the Waitangi Tribunal and managed historical research on treaty claims on behalf of iwi and hapu groups with which he is associated.

[66] Mr Mikaere described the likelihood of Wiremu Kingi's burial at the site contended by Mr Doorbar as *improbable*.[38] He stated that the decision by HNZ to decline Greymouth's application was ... *based solely on hearsay evidence with no supporting documentation.*[39] Mr Mikaere referred to the evidence identifying Wiremu Kingi's place of burial at Kaingara Kainga. He disputed that Wiremu Kingi would have left personal information to a member of Otaraua Hapu given that Ihaia Te Kirikumara (a contemporary of Wiremu Kingi and a leading chief of Otaraua Hapu at that time) was a proponent of selling land to the government and later acted as a government advisor.[40] (In response to that contention, Mr Doorbar provided his whakapapa as a descendant of

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32 NOE, page 181.
33 NOE, page 253.
34 Chamberlain EIC at para 3.
35 Chamberlain EIC at para 16.
36 Chamberlain EIC at para 18.
37 Chamberlain EIC at para 19.
38 Mikaere EIC at para 37.
39 Mikaere EIC at para 16.
40 Mikaere EIC at paras 28–30.

Mokopurangi from Kaingaru rather than of Ihaia Te Kirikumara of Otaraua.)

[67] Mr Mikaere also cited the sack of Otaraua Pa at Te Karaka by Wiremu Kingi, Otaraua support for the British troops during the Taranaki wars, fighting against Titokowaru and an active letter writing campaign by Otaraua to undermine Wiremu Kingi with the pakeha population, as highly unlikely reasons why information about Wiremu Kingi's burial would be entrusted to members of Otaraua Hapu.[41]

[68] The Court found this matter difficult. There can be no doubt as to the genuineness of Mr Doorbar's belief as to the whereabouts of Wiremu Kingi's final burial place. He was clearly an honest witness presenting a deeply held belief based on oral tradition to the Court. However relying solely on Mr Doorbar's evidence to establish the burial site of Wiremu Kingi as a matter of legal proof is faced with some difficulties.

[69] In saying that we reject the unfortunate implication contained in Greymouth's closing submission that it is ... *an extraordinary coincidence that Mr Doorbar, who has been a determined opponent of previous developments by Greymouth, is the sole repository of knowledge of the alleged reburial ...*[42] to the extent that it is intended to suggest that Mr Doorbar's evidence was created for the purpose of bolstering opposition to Greymouth's application.

[70] As we stated previously we are satisfied as to the genuineness of Mr Doorbar's belief in that regard. Our view is confirmed by the evidence of Ms Chamberlain who said that Mr Doorbar had raised the issue of Wiremu Kingi's burial place with her long before the Greymouth application was ever made. Notwithstanding those comments, the fact that Mr Doorbar is apparently the sole repository of the knowledge unsupported by any other substantive evidence creates difficulties in terms of ultimate reliance upon it.

[71] Those difficulties are compounded by a newspaper article of 29 June 1963[43] relating to the establishment of a memorial to Wiremu Kingi at his burial place at Kaingaru. Although there was some debate as to precisely where the memorial was to be located according to a newspaper article, it was certainly not on the spot suggested by Mr Doorbar as being the (re)burial site. Mr Doorbar suggested that his uncle who had apparently identified the burial site in the newspaper article may have adopted a ruse to protect the real burial site however that view must be regarded as speculative. If it was a ruse it has been successful to the extent that it has created confusion in this case.

[72] When these matters are added to Mr Mikaere's historical narrative we come to the view that we are simply unable to find conclusively that the site indicated by Mr Doorbar is the final resting place of Wiremu Kingi, even on the balance of probabilities. We accept that Mr Doorbar's site may possibly be that place but we do not know that with the degree of confidence required to make a positive finding to that

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41 Mikaere EIC at para 31.
42 Greymouth closing submissions at para 46.
43 Exhibit 3.

extent. That finding of itself means that the Greymouth appeal should succeed. Again however, in the event that we may be considered wrong in our findings in that regard, we go further and consider the merits of the application on the basis that the burial site might be in the location contended by Mr Doorbar. Before doing so however, we address the two other issues which arose during the course of debate on this topic.

[73] The first is Mr Doorbar's refusal to disclose the precise location of the burial site. The Court understands and respects his reasons for not doing so. Although there was some discussion during the case as to the possibility of the burial site being looted, the desire to allow the remains of a distinguished chief to lie undisturbed even from those with good but curious intentions, is of itself an adequate explanation. Unfortunately however a secret site is a two-edged sword in that the inability for the Court to accurately identify the site equates to a corresponding inability to adequately assess the effects of a proposal on it. The Court respects Mr Doorbar's motivation and understands his dilemma but his decision not to disclose the precise location made his case more difficult to prove.

[74] The second matter arising under this issue came about from the cross-examination of Mr Mikaere. Mr Gilbert made a specific and direct attack on Mr Mikaere's integrity and credibility. The basis of the attack was that Mr Mikaere was being paid to give evidence and had been bankrupted on 21 February 2014 due to a debt owed to the Inland Revenue Department. Mr Gilbert suggested that ... *his parlous financial state at present, as an undischarged bankrupt, is relevant to how it is that he might behave in relation to his paymasters.*[44] He further advanced in support of that proposition the fact that Mr Mikaere is presently a director of a company called Crummer Road Investments Ltd contrary to the requirements of the Insolvency Act.

[75] We saw no justification in the evidence which we considered to support the propositions advanced by Mr Gilbert. In our experience it is common practice for expert witnesses to be paid by the persons on whose behalf they give evidence. We have never before heard it suggested that the fact that they are paid, of itself, means that such witnesses give evidence other than as they are obliged to as experts before the Court. We note that Mr Mikaere confirmed that he was familiar with the Court's Code of Conduct for Expert Witnesses and agreed to comply with it, as all expert witnesses do in proceedings before this Court. We consider that the reference by Mr Gilbert as to Greymouth being Mr Mikaere's *paymaster* constituted a snide attack on both Greymouth and Mr Mikaere to the extent that it implied that Greymouth had sought to influence the exercise of Mr Mikaere's professional judgment by paying him or that Mr Mikaere had been so influenced.

[76] Mr Mikaere's evidence constituted a detailed historian's consideration of relevant records and historical knowledge. It was not contradicted by any other historian nor did he resile from it in cross-examination. Much of the evidence took the form of opinion which can of course be challenged, but nothing which we heard led the Court to the view that Mr Mikaere's opinion was given on anything other than an

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44 NOE, page 79.

honest basis. He explained that the company Crummer Road Investments Ltd of which he had apparently remained a director and shareholder, notwithstanding his bankruptcy, had not in fact traded for 10 years or so although it obviously remained on the Companies Register. He advised that the Official Assignee has consented to him continuing to act in his professional capacity.

[77] Parties are absolutely entitled to challenge the integrity and credibility of any witnesses (including any expert witnesses) who appear before this Court. We consider that such a challenge should be based on substance rather than mere conjecture or speculation as it was in this instance. We concur with the description contained in Greymouth's closing submissions as to the objectionable and wholly unjustified attack on Mr Mikaere's integrity.

Pukerangiora Pa

[78] We have briefly set out the circumstances pertaining to Pukerangiora Pa in [16] (above). Evidence on this matter was given to the Court by Mrs Belton, Mr Teira (including extensive documentary evidence) and Mr Mikaere. The pa was the site of a three month siege by Waikato Maori in the 1830s. At the conclusion of the siege the pa was sacked and its residents either fled, were captured or slaughtered. Many of the deaths occurred as a result of the pa's inhabitants throwing themselves and their children off steep river bluffs.

[79] Mrs Belton's evidence-in-chief regarding these matters included the following:

> 4.5 The area of concern is recognised as a Waahitapu. As a child I was told that this area has many people buried from the Pukerangiora tragedy in the 1830s. My grandfather Te Kekeu himself told me this in the 1940s. We were never allowed to muck around down there. Many of our people who tried to escape Pukerangiora were caught trying to get away from the Pa and killed down there. Many were later buried where they fell. It is sacred to us.
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> 4.6 We also did not know at the time of Greymouth's application that this area was where Wi Kingi Te Rangitake is buried. He was a great rangatira. Rawhiri Doorbar has told our hapu of this burial, and that this information was passed down to him.

Mrs Belton is of Pukerangiora Hapu. It is that hapu within whose rohe Kowhai D is situated.

[80] None of the witnesses told us precisely how far Kowhai D was from Pukerangiora Pa. We understand it to be a kilometre or so. Nor did Mrs Belton suggest that Kowhai D itself was the site of burials arising from the massacre at Pukerangiora. During the course of one of our site visits Mrs Belton gave a general indication as to where the possible burial sites might be but that did not extend to Kowhai D. We understood that the area of concern to Mrs Belton was in the general area of where Mr Doorbar contended Wiremu Kingi's gravesite was situated but we cannot be more specific than that. It appears that this area is possibly

somewhere between 300–500 m away from Kowhai D.[45] Mr Doorbar estimated that is was 300–400 m away.[46]

[81] Nothing in the evidence which we heard from any of the witnesses led us to the view that burial remains from the sack of Pukerangiora Pa are present at Kowhai D. That does not exclude the possibility that such remains might be found during the course of earthworks at Kowhai D. That is why Greymouth has made the application which it has.

[82] We consider it is significant that when Mr Bruce made contact with Pukerangiora representatives no indication was given to him that unrecorded archaeological sites would be affected by the works at Kowhai D nor that the well site was situated too close to a wahi tapu. These discussions took place at the preliminary archaeological investigation stage in July 2014 before Greymouth had made any application to HNZ.

[83] The point was subsequently made that Mrs Belton (who is mandated to deal with these matters for Pukerangiora) was not involved in these discussions as she was ill at the time. Although Mrs Belton contended that the hapu chairman (Mr Trinder) who was dealing with the matter in her absence did not know the history of the application area as well as her, we consider that the history of such an incident as the sack of Pukerangiora and its associated deaths must be well known to members of the hapu other than just Mrs Belton. If there had have been any belief that Kowhai D might intrude into a burial site that would surely have been raised. In any event, we did not understand Mrs Belton to contend that was the case. It is apparent that the objection advanced by Mrs Belton is to Kowhai D being established in the general vicinity of possible burial sites rather than any physical impact which excavations might have on the burial sites. Again it seems surprising that such contention was not advanced by other members of the hapu.

Correctness of decision to decline consent

[84] Under this head we consider the merits of Greymouth's application. That is on the basis that for the purposes of this discussion we will assume that HNZ was entitled to take the wide approach to determination of this application which it did, that the burial site of Wiremu Kingi is situated in the position contended by Mr Doorbar and that there are burial sites from Pukerangiora Pa somewhere in the general area.

[85] As we have noted on a number of occasions Greymouth's application was declined by HNZ not on the basis of any unacceptable effects which earthworks could have on archaeological sites which might be found within Kowhai D, but rather because of adverse effects of the proposal on significant Maori values in the wider vicinity which warranted protection.[47] Initially those values revolved around the presence of the grave site of Wiremu Kingi in the Waitara Valley but by the time of our

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45 NOE, page 135.
46 Doorbar EIC at para 6.8.
47 See at [4] (above).

hearing the concerns were expanded by HNZ by reference to the presence of Pukerangiora Pa and sites associated with it in the vicinity of Kowhai D.

[86] Counsel and witnesses referred to the wider area by reference to ... *cultural values associated with the wider landscape of the Site*[48] or by reference to a *cultural landscape*.[49] When asked to describe what constituted a cultural landscape, Mr Teira replied:[50]

> ... a cultural landscape is very much similar to in terms of physical extent similar to a natural landscape and in this particular case it's where you have Pa or several Pa, there are usually villages and fishing places and waka landing sites that are all associated with one another and so we have within our listing role under our legislation we have wahi tapu areas and a wahi tapu area allows us to consider the wider landscape, the cultural landscape. So it's not just one specific place but where there are a number of things that relate to one another. So yesterday we were taken to Pukerangiora, that place wouldn't have been the place where people lived all the time. There would have been villages that are associated with the Pa and the cultural landscape allows us to understand the relationship between those villages and the Pa sites.

[87] We think that to some extent the use of these expressions was confusing. It was not clear to us whether or not HNZ in fact regarded the area under discussion as an historic area or historic place as defined in s 6 (and Mr Teira's description of a cultural landscape coincides closely with the definition of historic area) which would be subject to specific protection processes under the Act or whether it was being suggested that an area with cultural values or a cultural landscape was some lesser sort of historic area or place which HNZ might protect through the process it adopted in this case.

[88] Setting those matters to one side, the lack of any adequate definition of the area which fell within the description was of concern to the Court. There was no explanation given to the Court as to where this wider landscape or cultural landscape might start or finish nor the reasons why that might be the case. What we do know is that Mr Doorbar whose advice HNZ relied on in reaching its decision opposed any site south of the river no matter where situated and that Mrs Belton opposed any oil and gas development anywhere within Pukerangiora's rohe.

[89] The absence of any delineation of the area or cultural landscape under consideration might appear to some as a legalistic rather than a practical consideration. We do not believe that to be the case when we turn to consider the effects which Greymouth's proposal might have on the contended gravesite of Wiremu Kingi and the possible burial site of victims from Pukerangiora. In each case they are 300 m or so (apparently more in the case of the Pukerangiora site) away from Kowhai D.

[90] The area around Kowhai D consists of pasture land, small hillocks and areas of planted and natural forest. We do not know whether the gravesite or possible burial area lie in the same visual catchment as

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48 HNZ opening submissions at para 4.
49 NOE, page 188 (Mr Teira), Ms Bain, at [14] (above).
50 NOE, page 186.

Kowhai D or are separated from it by the physical features of the land. No suggestions were advanced that these sites might be affected in any way by noise or by vibration from drilling operations.

[91] Mr Gilbert said that the matter at issue is the ... *intangible spiritual inappropriateness or interference with the site.*[51] and that HNZ needed to ... *look at the spirit or the intangible qualities of the wider landscape.*[52] Mr Teira defined the issue as being ... *whether it's appropriate to have some sort of industrial area on or near or within the cultural landscape.*[53]

[92] Making reference to the burial site of Wiremu Kingi and the gravesite of the Pukerangiora victims Mr Doorbar observed that ... *It's a peaceful place, and I couldn't think of an area that is more worthy of protection, I couldn't think of a better decision from this Court as to allow that place to remain.*[54] No evidence was given as to how these operations might disturb the peace of the sites in question. Mr Doorbar contended that ... *A cruel irony and further injustice will be committed to one of the most significant men of his time if an oil installation sits next to his final resting place; a symbol of the colonisation and injustice meted out to a great man during his lifetime.*[55]

[93] We disagree with Mr Doorbar's description that Kowhai D *sits next* to the contended burial site of Wiremu Kingi. On the basis of his own evidence it is 300 m away. It sits in an area which has been cleared and farmed and where there is a milking shed, large vehicle shed incorporating living space and power lines already in existence within 300 m. We do not know if Kowhai D can even be seen from the grave site.

[94] Mrs Belton's concerns were along similar lines to those of Mr Doorbar. She regarded the drilling operation as *a desecration* and described it as ... *piercing the heart of ... Mother Earth.*[56]

[95] It was apparent to the Court from the evidence which we considered that it was the mere presence of a drilling operation at Kowhai D and the knowledge of that presence which were the matters at issue in this case. We do not seek to belittle those concerns. They are unquestionably beliefs relating to the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tupuna, wahi tapu and other taonga which arise under s 59(1)(a)(vi) of the Act. The Court regularly deals with these matters under s 6 of the RMA.

[96] The views of Mr Doorbar and Mrs Belton as to the inappropriateness of the activities in this case have been forcefully expressed. In reality they seek a right of veto over activities in the vicinity of, but not within, their cultural sites. There are clearly arbitrary aspects to that:

- It was apparent from the submissions made on behalf of HNZ and the evidence of some its witnesses (for example Messrs Teira and

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51 NOE, page 135.
52 NOE, page 136.
53 NOE, page 188.
54 NOE, page 254.
55 Doorbar EIC at para 14.5.
56 NOE, page 261.

Doorbar) that there would be some activities which they would allow and some which they would oppose depending on what they regarded as the degree of industrialisation involved in the activity. The industrial structures which we described in [8] (above) are unremarkable structures of modest dimension. It is difficult to see how anyone could have any objection to the appearance of the structures themselves in the midst of the working farm environment where Kowhai D is situated. The drilling rig itself is considerably larger but is in place for only a short time.

- Neither the witnesses nor Counsel for HNZ explained or attempted to explain to us why a buffer distance of 300 m between Kowhai D and the nearest site of concern to Maori was inadequate. There was no evidence that Kowhai D and its related operations could be seen, heard or experienced (for example by way of vibration) from the cultural sites. No explanation was given as to why the buffer distance of 50 or 100 m from cultural sites contained in the New Plymouth District Plan was inappropriate in this case.

[97] We consider that in deciding whether or not to grant an authority to Greymouth in this instance it is reasonable to balance the cultural considerations we have identified above with the facts that:

- Greymouth's proposal does not involve any unacceptable disturbance or destruction of Kowhai D itself.
- Kowhai D is situated somewhere between 300–500 m away from the cultural sites in question.
- Operations on Kowhai D will have no discernible physical effects on the cultural sites in question.
- Kowhai D's proposal is to undertake a lawful use of land which is authorised pursuant to the exploration and mining permits which it holds.

When these matters are taken into account we believe that there is no appropriate basis on which to decline the authority sought by Greymouth and we hereby allow its appeal accordingly.

[98] We have issued this decision as an interim decision. We are unaware as to the appropriate conditions which ought apply in respect of an authority granted pursuant to the provisions of the Act.

[99] We will allow a period of 20 working days for discussions to take place between HNZ and Greymouth with a view to resolving appropriate conditions and submitting a joint memorandum to the Court identifying the conditions to be included in the final order.

[100] If the parties are unable to agree they should submit separate memoranda at the end of the period identifying those matters where they are in agreement and those where they are in disagreement. The Court will then determine whether or not it is necessary to hold a further hearing regarding appropriate conditions. We would be disappointed if that was necessary.

Costs

[101] Costs are reserved. If Greymouth wishes to make an application for costs it should do so and HNZ respond in accordance with

the provisions of the Court's Practice Note 2014. Time to run from the date of this decision.

Orders

(A) Appeal allowed, conditions to be finalised.
(B) Costs reserved.

Reported by: Rachel Marr, *Barrister and Solicitor*

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Para No

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 [RMA], s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

7 At [1341].

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with

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8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].
15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

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16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

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23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the

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33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
>
> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
>
> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

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40 See s 87A.

41 *King Salmon* (Leave), above n 10, at [1].

Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

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[42] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters …

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

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43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

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46 The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

47 See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of ss 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

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[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

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49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

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[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.
>
> …

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47 to 52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
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> …
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> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
>
> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

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64 *King Salmon* (Board), above n 6, at [1227].

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

> … may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource … is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

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85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

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[93] Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

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[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

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111 *Man O'War Station*, above n 46, at [48].
112 *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting

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113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

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116 RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> … in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

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[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

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[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
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> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

(b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

…

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

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[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

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166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate … use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:

…

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

13 Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

…

15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate … use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

…

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

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172 At [98]–[105] of the majority's reasons.

(a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

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175 At [144] of the majority's reasons.
176 See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

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Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoing basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003 approved.

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC).

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

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1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.
(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.
(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

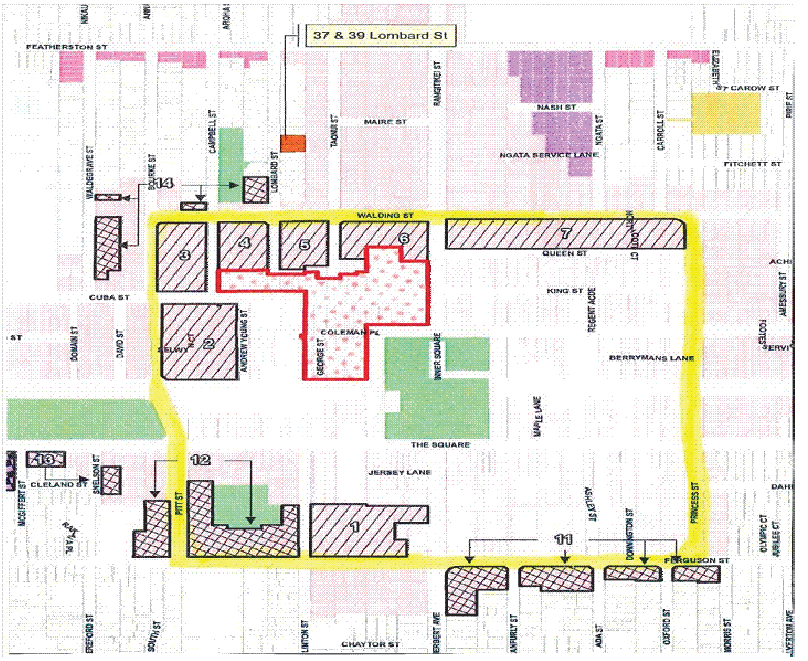
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

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2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater*.

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

7 Section 32(6).

8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include —*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

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9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

> **Certain persons may make further submissions**(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
> (a) any person representing a relevant aspect of the public interest; and
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

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11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].
> (2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council*.[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater*. *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council*.[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater*. That gloss was disregarded in *Option 5*. I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

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23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

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27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

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35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
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> ...
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> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

Countdown Properties (Northlands) Ltd v Dunedin City Council

High Court, Wellington
1-8 February; 7 March 1994
Barker J, presiding, Williamson and Fraser JJ.

AP 214/93

District plan — Plan change — Private request for a plan change — Timing of s 32 report — Whether report should be available prior to public hearing of submissions on plan change — Distinction between privately requested plan changes and changes initiated by local authorities or Ministers — Robust and practical approach to whether substance of report complies with s 32 — Whether Tribunal capable of curing defects — Amendments to advertised plan change — Deferral of change until review of district plan — Use of zoning in transitional district plans — Applicability of both ss 290 and 293 — Resource Management Act 1991, ss 5, 9(1), 19, 32, 38, 39, 73(2), 76, 290, 293, 299, 311, 373(3), First Schedule.

These were appeals concerned with a request by M L Investments Co Ltd and Woolworths (NZ) Ltd (collectively referred to as Woolworths) to the Dunedin City Council (the council), seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. Woolworths intended to develop a "Big Fresh" supermarket in the block. The appellants, Transit New Zealand (Transit), Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively referred to as Countdown), and Foodstuffs (Otago/Southland) Ltd (Foodstuffs) were dissatisfied with the council's decision in favour of the plan change, and initiated references to the Planning Tribunal under cl 14 of the First Schedule to the Resource Management Act 1991 (the Act). They subsequently appealed from the Tribunal's decision to the High Court on numerous grounds.

The first three grounds concerned the council's duties under s 32 of the Act. Foodstuffs and Countdown argued that the Tribunal was wrong in law when it held that the council had fulfilled its obligations under s 32. Foodstuffs and Countdown claimed that s 32 required the council to prepare a s 32 report before advertising the plan change, or at the latest before the hearing of submissions regarding the plan change. The focus of their argument was on the effect of the words "before adopting" in s 32. It was submitted that s 32(3) clearly indicated that the words "before adopting" meant "prior to public notification". It was also argued that s 19 would produce an anomalous situation if any other interpretation was adopted. It was claimed that the

principles of natural justice required that a s 32 report be made available to people making submissions prior to a hearing. The adequacy of the council's s 32 report was also challenged, which raised the issue of whether the subsequent Tribunal hearing could have cured any defect in the council's s 32 report, should one have existed.

After hearing submissions on the plan change, the council ultimately adopted a plan change which differed from the plan change which had been advertised before the hearing. The appellants argued that the council's action in making the amendments had been ultra vires. At issue was the effect of cl 10 of the First Schedule to the Act, which states that after hearing submissions "the local authority concerned shall give its decision regarding the submissions and state its reasons for accepting or rejecting them".

The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled, because the forthcoming review of the whole district plan was a more appropriate way of dealing with the resource management issues involved. The appellants argued that it was preferable to pursue integrated management for all parts of the district and that the best time to do this was at the time of the review.

The appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. They claimed that the Act does not provide for zoning to restrict activities according to type or category, unless it can be shown that the effects associated with a particular category breach "effects-based" standards.

The appellants challenged the validity of rule 4 of the plan change on the basis that the rule purported to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they could proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 of the Act.

It was argued that the rules in the plan change contained a number of phrases which were vague and uncertain. The appellants claimed that the Tribunal had incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could have made it.

The appellants claimed that, by accepting the evidence of one of the respondent's witnesses on the economic effects of the plan change, the Tribunal had made a decision so unreasonable that no reasonable tribunal could have made such a decision. The appellants also claimed that the Tribunal had failed to consider the evidence presented by a number of the appellants' witnesses, and that the Tribunal had been unfairly selective in the evidence it relied upon.

It was argued that s 290 of the Act applied to the proceedings before the Tribunal, and that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32 analysis in the same way as the Council had. The Tribunal had held that s 290 did not apply, and that instead s 293 was applicable, and it received its powers from that section.

Transit had reached a settlement with the Council prior to the hearing of this appeal. The appellants claimed that the settlement should not be implemented in the manner suggested, and that the rules of the settlement should be remitted to the Tribunal for consideration before they were implemented.

Held (dismissing the appeals by Countdown and Foodstuffs):

(1) The Tribunal made the correct decision about the timing of the s 32 report. There is no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. It is not inconsistent with the procedure set out in cls 21 to 28 of the First Schedule to the Act a local authority to adopt changes after public notification, submissions and decisions on submissions.

(2) "Adopting" by a local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. When a private individual requests a plan change, it can be rejected only in limited circumstances. Once a request passes the threshold, a local authority might well feel the need to hear and consider submissions before it proceeds with the potentially onerous s 32 investigation. There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change. However the effect of s 32(3) is that where a plan change has been initiated by the local authority itself, or by another local authority or a Minister, a s 32 report must be made available at the time the plan change is advertised.

(3) There was no merit in the submission relating to natural justice. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion.

(4) The Tribunal had held that while the council's s 32 report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. The Tribunal was correct in the robust and practical approach that it took. Any defect of substance in the council's decision and s 32 analysis would have been capable of exploration, resolution and correction by the Planning Tribunal.

(5) To take a legalistic view that under cl 10 of the First Schedule a local authority may only accept or reject the relief sought in any given submission would be unreal. The local authority or Tribunal must consider whether any amendment made to a plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, the Tribunal did this here. It was difficult to see how anyone could have been prejudiced by the alterations in the council's finished version. Of all the changes made by the council, only the change to rule 4 could not have been justified by any of the submissions. The Tribunal was correct in holding that this omission was not fatal, and that there was a power to excise offending variations without imperilling the plan change as a whole.

(6) The Court rejected the appellants' claims that the plan change should

have been cancelled and dealt with in the forthcoming review of the whole district plan. The legislature had indicated in the Act that plan changes which had more than minimal planning worth should be considered on their merits, even though sponsored by private individuals, unless they were sought within a limited period before a review.

(7) Zoning is a method of resource management, albeit a rather blunt instrument in the Resource Management Act context. Here use of zoning represented a reasonable and practical accommodation of the new plan with the old scheme, and was acceptable for the remainder of the life of the transitional plan.

(8) Rule 4 in the plan change, which required resource consent applications for certain activities within the zone, was within the general scope of s 76(1) and was not ultra vires the council's powers. Even if this decision was incorrect, s 373(3) applies so that a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

(9) The Tribunal did not incorrectly apply the law, nor make an unreasonable decision, with regard to the certainty of certain phrases used in the plan change.

(10) The acceptance or rejection of the evidence of one of the respondent's witnesses was a question of fact for the Tribunal, and could not be appealed.

(11) The appellants' submission that the Tribunal was unfairly selective in its adoption of evidence had to be considered in the light of the Tribunal's expertise. The hearing was extremely thorough, and the Court was unable to hold that the Tribunal erred in law merely because it omitted to mention the appellants' witnesses by name.

(12) Both ss 290 and 293 applied to the proceedings before the Tribunal, as the hearing was in effect an appeal. Although the Tribunal did not recognise that s 293 applied, and that it therefore had a duty to carry out a s 32 analysis, the steps it would have taken in its deliberation and judgment had it recognised the applicability of s 293 would have been no different from those set out in detail in its decision. Therefore as a whole the Tribunal's approach was correct, and it did not err in law.

(13) The Court allowed Transit's appeal by consent and remitted to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement between the Council and Transit

Cases considered

Ashburton Borough v Clifford [1969] NZLR 927

Auckland City v Auckland Heritage Trust (1993) 1 NZRMA 69

Batchelor v Tauranga District (No 2) [1993] 2 NZLR 84; (1992) 2 NZRMA 137

Bitumix Ltd v Mt Wellington Borough [1979] 2 NZLR 57

Burr (AJ) Ltd v Blenheim Borough [1980] 2 NZLR 1

Calvin v Carr [1980] AC 574

Environmental Defence Society Inc v Mangonui County [1987] 2 NZLR 496; (1987) 12 NZTPA 349
Environmental Defence Society Inc v Mangonui County [1989] 3 NZLR 257; (1989) 13 NZTPA 197
Haslam v Selwyn District (1993) 2 NZRMA 628
K B Furniture Ltd v Tauranga District [1993] 3 NZLR 197; (1993) 2 NZRMA 291
Kirkham v Attenborough [1897] 1 QB 201
Love v Porirua City [1984] 2 NZLR 308
McLeod Holdings Ltd v Countdown Properties Ltd (1990) 14 NZTPA 362
Manukau City v Trustees of Mangere Lawn Cemetry (1991) 15 NZTPA 58
Meade v Wellington City (1978) 6 NZTPA 400
Morrow v Tauranga City (Decision A 46/80)
Nelson Pine Forest Ltd v Waimea County (1988) 13 NZTPA 69
Noel Leeming Ltd v North Shore City (No 2) (1993) 2 NZRMA 243
Northland Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530
Royal Forest and Bird Protection Society Inc v W A Habgood Ltd (1987) 12 NZTPA 76
Waimea Residents Association Inc v Chelsea Investments (High Court, Wellington M 616/81, 16 December 1981, Davison CJ)
Wainuiomata District v Local Government Commission (High Court, Wellington CP 546/89, 20 September 1989, Greig J)
Wellington City v Cowie [1971] NZLR 1089
Wellington International Airport v Air New Zealand [1993] 1 NZLR 671

Appeals under the Resource Management Act 1991.

R J Somerville and *R J M Sim* for Foodstuffs
T C Gould and *D G Bigio* for Woolworths
E D Wylie for Countdown
A J P More for Transit
N S Marquet for Dunedin City Council

Judgment of the Court. These appeals from a decision of the Planning Tribunal given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 (the RMA) — a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town and Country Planning Act 1977 (the TCPA) were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit New Zealand (Transit) that his client had reached a settlement with the first respondent, the Dunedin City Council (the council) and the second respondents, M L Investment Co Ltd and Woolworths (NZ) Ltd, (called collectively Woolworths). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively called Countdown); and Foodstuffs (Otago/Southland) Ltd (Foodstuffs).

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the greater Dunedin region, the council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the "city", as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the council's transitional district plan under the RMA. The task imposed by the RMA on the council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA lies in the ability of persons other than public bodies to request a council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the council seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 ha), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the "specified departure" procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business district. They lodged submissions in opposition to the plan change with the council and appeared at a hearing of submissions before a Committee of the council. Dissatisfied with the council's decision in favour of the plan change, they initiated references to the Tribunal under cl 14 of the First Schedule to the RMA (the First Schedule). The concept of a "reference" of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by s 299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties other than Countdown and Foodstuffs making submissions to the council were two who subsequently sought references of the proposed plan change to the Tribunal; ie Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access; two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under s 311 of the RMA:

- whether the council could change its transitional district plan; and
- whether the council could lawfully complete the evaluation and assessments required by s 32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was

subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard lasted 16 sitting days; its reserved decision occupies some 130 pages. [The decision is reported in part as *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497.] The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology

Woolworths' request, made pursuant to s 73(2) of the RMA, was received by the council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the council, acting under delegated authority, resolved to "agree to the request" in terms of cl 24(a) of the First Schedule. This resolution was made within 20 working days of receiving the request as required by cl 24. The council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations, and to request and commission all additional information as required by the RMA. There was consultation by the council with Woolworths as envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the council's expenses in undertaking the exercise.

Early in February 1992, the council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District". The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in s 32 of the RMA was presented to the Council Planning Hearings Committee by a Mr K Hovell, a consultant engaged by the council to advise it on the proposed change. It was found by the Tribunal, as fact, that the analysis

required by s 32 (to be discussed in some detail later) was not prepared by the council until after the hearing of submissions. Obviously therefore, no draft s 32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the committee to a draft s 32 analysis prepared by Mr Hovell; a final version was prepared by him at the committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the committee at this stage of its deliberations. On 11 August 1992, the committee, acting under delegated powers, decided that the change should be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the council's decision, a legal opinion from the council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel cooperated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern*

Milk Ltd [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

Grounds 1, 2 and 3

1 The Tribunal misconstrued the provisions of s 32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form.

2 The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by s 32.

3 The Tribunal misconstrued s 32 and s 39(1)(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's s 32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.

These grounds are concerned with the council's duty under s 32 of the RMA and can be dealt with together by a consideration of the following topics —

- Was the council correct in not fulfilling its duties under s 32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the council right to carry out the s 32 analysis after the public hearing of submissions but before it published its decision?
- Should the council have made a s 32 report available to persons making submissions on the plan change?
- Was the council's actual s 32 report an adequate response to its statutory responsibility?
- If the council was in error in its timing of the s 32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal, an independent judicial body before which all relevant matters were canvassed?

Section 32 of the Act at material times read as follows —

32. Duties to consider alternatives, assess benefits and costs, etc. — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —

(a) Have regard to —

(i) The extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and

(ii) Other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may

be used in achieving the purpose of this Act, including the provision or information, services, or incentives, and the levying of charges (including rates); and

(iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and

(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —

(i) Is necessary in achieving the purpose of this Act, and

(ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

(2) Subsection (1) applies to —

(a) The Minister, in relation to —

(i) The recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53:

(ii) The recommendation of the making of any regulations under section 43:

(b) The Minister of Conservation, in relation to —

(i) The preparation and recommendation of New Zealand coastal policy statements under section 57:

(ii) The approval of regional coastal plans in accordance with the First Schedule:

(c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.

(3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except —

(a) In a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or

(b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule.

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. Section 73(2) provides —

> Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in the First Schedule.

Clause 23 of the First Schedule requires a written request to the local authority to change a plan to define the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change. An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under cl 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to

the request" or "refuse to consider" it. The words "agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (ie agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in cl 24(b) or defer preparation or notification on the grounds stated in cl 25. The council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a "reference") to the Tribunal (cl 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within three months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). "Any person" is entitled to make submissions in writing; cl 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form. The Court of Appeal in *Wellington City Council v Cowie* [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in s 39 of the RMA; notably, no cross examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (cl 27 of the First Schedule). The council may make amendments, of a minor updating and/or "slip" variety before resolving to

approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in s 32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (cl 21), "prepared" (cl 28), "publicly notified" (cl 5), "considered" (cls 10 and 15), "amended" (cl 16), and "approved" (cls 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's s 32 duties can be summarised thus:

(a) Read in the context of s 32(2) the word "adopting" as used in s 32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.
(b) The duties imposed by s 32 are to be performed "before adopting", that is, before the change is made into an effective planning instrument.
(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.
(d) If Parliament had intended that in every case s 32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.
(e) A separate document of the local authority's conclusions on the various matters raised in s 32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.
(f) In relation to Change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision that the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that s 32 requires the council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under s 32 after that point.

Interpreting the provisions of s 32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. Section 32(2) describes the

persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A local authority is limited to "the setting" of objectives, policies and rules under Part V, which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the setting of objectives, policies and rules.

Under s 32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in cls 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the change its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under cl 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (cl 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher MR in *Kirkham v Attenborough* [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process. There can be no act or decision inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They

concerned, first, s 32(3) and, second, s 19. It was submitted that s 32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with s 32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under cl 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that s 32(3) was capable of giving that indication but concluded that, if Parliament had intended the s 32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether s 32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exclusion of privately requested changes in the words "change to a plan" in s 432(3)(a); (b) the use of the term "proposed plan" in the first phrase of s 32(3) does not preclude a challenge to the council's performance of its s 32 duties in a submission under cl 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with s 32 by the Council. They do not have to do so in their submission.

This approach to s 32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not "adopted" for the purposes of s 32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the s 32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of s 32(3). We hold that the "adopting" by the local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of s 32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s 32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is three months away or if the request is frivolous, vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous s 32 investigation. It may not have time to do so even within the three months required under cl 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to "adopt" it. It will have to consider the wider implications of a proposed plan change during a period limited by cl 28 to three months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a s 32 report being prepared. A local authority might not be therefore in a position to "adopt" the plan change until it had the s 32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a s 32 report because the Act in s 32(3) clearly envisages their having the right to comment on a s 32 report, the answer lies in the interpretation we have given to s 32(3). There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the council's decisions or submissions to the Tribunal can criticise the s 32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which s 32(3) applies; ie plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s 32 report would have to be available at the time the plan change is advertised because of the limitation contained in s 32(3) on the right to comment on the adequacy or otherwise of a s 32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a s 32 report should include as a precaution a statement that the s 32 report was inadequate; this was suggested in argument by counsel for the council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between "adopt" and "approval" is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the council or of a Tribunal direction on a reference may cause the local authority to find that its "adopting" of the change was erroneous.

However, with the plan change initiated privately, adopting comes at the time when the council decides after hearing all the submissions that it should adopt the change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to "adopt" a plan change.

In the case of a plan change requested by another authority or by the Minister to which s 32(3) applies, a council receiving the request will have to "adopt" the change prior to advertising the change and therefore complete its s 32 report by that stage. Again, the council may not ultimately "approve" the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a s 32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its s 32 evaluation of the proposal. If there were not time available within the three months, then there is power for the local authority under s 38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for "adopting" the plan change therefore in terms of s 32, is a "moveable feast" depending on whether or not the plan change is initiated by a private individual.

Section 19 of the RMA is as follows —

> **19. Change to plans which will allow activities —**
> Where —
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
> (b) The time for making or lodging submissions or appeals against the new rule or change has expired and —
> (i) No such submissions or appeals have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed —
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative.

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under s 32 must take place before the time for making or lodging submissions or appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to s 32.

The Tribunal did not place any weight on the argument under s 19. We have carefully considered the submissions and conclude that, while s 19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as s 32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under s 32(1)(a), (b) and (c). Certainly there are no words within s 19 which purport to affect the duty under s 32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. Section 9(1) of the RMA provides as follows:

> No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is —
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by section 10 (certain existing uses protected).

As noted "proposed district plan" includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. Section 19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the s 32 report; in the circumstances of this case, the report was properly "adopted" at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a s 32 report available to them prior to the hearing of submissions. Reference was made to s 39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under s 32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and

call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the first respondent is challenged in Ground 2. It was claimed that the council (a) had taken into account irrelevant considerations, namely, ss 6, 7 and 8 of the RMA; (b) had failed to take into account matters; and (c) had applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the council's s 32 analysis report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal incorrectly permitted an inadequate compliance by the council with its s 32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated [2 NZRMA 497, 521] —

> In our opinion failures to perform the s 32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act.

Earlier it stated [2 NZRMA 497, 521] —

> Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by s 32 can be condoned, compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required. If any deficiency that may be discovered from a punctilious scrutiny of a s 32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form.

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the s 32 exercise or the adequacy of the first respondent's s 32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the council's decision and s 32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced counsel. We are conscious of the approach described in *Calvin v Carr* [1980] AC 574, *A J Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1 and *Love v Porirua City Council* [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the council stage of hearing were cured by the thorough and professional hearing

accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

> **Ground 4.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision.

A revised and expanded version of the plan change as advertised emerged when the council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the council, that the council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing relevant segments of the change as advertised with the counterparts in the council's finished product.

Mr Marquet for the council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of counsel's submissions, which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups: (a) those sought in written submissions; (b) those that corresponded to grounds stated in submissions; (c) those that addressed cases presented at the hearing of submissions; (d) amendments to wording not altering meaning or fact; (e) other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A person making a submission is required by cl 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the council under cl 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the

proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned shall give its decision *regarding the submissions* and state its reasons for accepting or rejecting them". This is to be compared with reg 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall *allow or disallow each objection either wholly or in Part. . .*". (Emphasis added.)

Counsel for the appellants submitted that cl 10 was narrower in its scope than the TCP Regulations and did not permit the council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a council to either accepting a submission in its entirety or rejecting it".

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision.

Counsel relied on *Meade v Wellington City Council* (1978) 6 NZTPA 400 and *Morrow v Tauranga City Council* (Decision 46/80, 13 December 1979) which emphasised that a council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in *Nelson Pine Forest Ltd v Waimea County Council* (1988) 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the council and accordingly of the Tribunal, although no objector had expressly sought it. He said —

> . . . that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such

> applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.

The Tribunal noted and applied this test in *Noel Leeming Ltd v North Shore City (No 2)* (1993) 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of cls 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of (and by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the *Nelson Pine Forest* case, the Tribunal's decision in *Noel Leeming Ltd v North Shore City (No 2)* and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p 73):

> . . . it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement and ordinances in its plan. It follows that when an authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan have been previously advertised.

The same point was made by the Tribunal in *Noel Leeming Ltd v North Shore City (No 2)* at p 249 and the Tribunal in this case at p 59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628. The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based

upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the council. More importantly, it is hard to envisage that any person who had not participated in the council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate; because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then s 373(3) Of the RMA would apply; that subsection provides as follows —

> Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat

tenuous, it seems quite clear that at the extensive hearing before the council most of the matters were discussed. If they were not discussed before the council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

> **Ground 5.** The Tribunal erred in law when it determined the status of the written submission on plan change No 6 made by an employee of the first respondent Mr J Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision.

This ground was struck out by Barker ACJ at a preliminary hearing.

> **Ground 6.** The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.

> **Ground 7.** The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus 2 NZRMA 497, 532]:

> Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a

> three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons.

The Tribunal went on to point out that cl 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within three months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred and that the express provision for deferment in the First Schedule shows an intent by the legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

> **Ground 8.** The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued ss 5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

Under this ground, the appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural well-being (the words of s 5 of the RMA). Much was made of the difference between the RMA and the TCPA. Section 5 was said to be either or both "anthropocentric" and "eccentric".

Consideration of s 76 is required —

> **76. District rules** — (1) A territorial authority may, for the purpose of —
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan, —
> include in its district plan rules which prohibit, regulate, or allow activities.

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

(3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.

(4) A rule may —

(a) Apply throughout a district or a part of a district;

(b) Make different provision for—

(i) Different parts of the district; or

(ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons:

(d) Be specific or general in its application:

(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan.

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances .

We think that the Tribunal's approach was entirely correct. Section 76(3) enables a local authority to provide for permitted activities, controlled activities, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about s 5, the new philosophies of the RMA, and the need to abandon the mindset of TCPA procedures were given to the Full Court in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84; (1992) 2 NZRMA 137. That was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89; 142, quoting the Tribunal —

> Our conclusion on the competing submissions about the application of s 5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources.

As in *Batchelor's* case, reference was made in the appellants' submissions to the speech in *Hansard* of the Minister in charge introducing the RMA as a Bill. We find no occasion here to resort to our rather limited ability to use

statements in parliamentary debates in aid of statutory interpretation. *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to *Batchelor's* case is a decision of Thorp J in *K B Furniture Ltd v Tauranga District Council* [1993] 3 NZLR 197; (1993) 2 NZRMA 291. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the *Batchelor* and *KB Furniture* cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of s 5 of the RMA. In *Batchelor's* case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the *K B Furniture* case, Thorp J characterised *Batchelor's* case as pointing to —

> . . . the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court: and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process.

We agree with this statement entirely. This ground of appeal is also dismissed.

> **Ground 9.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of s 76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act.

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities

expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of land-owners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA; in a planning context, this principle is demonstrated by such authorities as *Ashburton Borough v Clifford* [1969] NZLR 927, 943. Counsel submitted that s 9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by s 74(4)(e); that normal principles of statutory interpretation should properly have applied to the construction of s 76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act.

> We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in s 76(4) than deliberately excluded. The rule is clearly within the general scope of s 76(1) and we do not consider that it was ultra vires respondent's powers.

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the legislature intended, by providing expressly for such rules in the circumstances referred to in s 76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in *Auckland City Council v Auckland Heritage Trust* (1993) 1 NZRMA 69 where Judge Sheppard held that a reference anywhere in a plan to a particular activity was sufficient to preclude the application of s 373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the *Auckland Heritage Trust* decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that s 373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not

specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

> **Ground 10.** The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty.

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; ie whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in *Bitumix Ltd v Mt Wellington Borough* [1979] 2 NZLR 57, and McGechan J in *McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362. The Tribunal then said (p 81) —

> With those judgments to guide us, and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be "specified" we return to consider the phrases challenged . . .

Mr Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had

applied them alone and had not borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building . . .". were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could not stand. This ground of appeal is also dismissed.

> **Ground 11.** That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to.

This ground was withdrawn at the hearing and is therefore dismissed.

> **Ground 12.** That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 was so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision.

This ground relates to the evidence of a statistical retail consultant, Mr M G Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p 34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of a specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a

finding of fact by the Tribunal — which is not permitted by the RMA. We therefore reject this ground of appeal.

> **Ground 24.** The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following — Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds.

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of evidence and one which no reasonable tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p 86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown . . .". The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

> **Ground 13.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of s 31.

Ground 14. The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977.

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

Ground 15. That the Tribunal erred in law by holding that s 290 of the Act did not apply to the references in Plan Change No 6.

Ground 16. That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in s 32(1).

Ground 17. That the Tribunal misconstrued the Act when it held that it has the powers conferred by s 293, when considering a reference pursuant to clause 14.

Ground 18. That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it.

The first step in the appellant's argument to the Tribunal on this part of the hearing was that s 290 of the RMA applied to the proceedings. That section reads:

> **Powers of Tribunal in regard to appeals and inquiries** — (1) The Planning Tribunal has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation.

The second step in the argument was that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32(1) analysis in the same way as the council had.

The Tribunal held that s 290 did not apply because the proceedings were not an appeal against the council's decision as such and that the Tribunal was not under the same duty as the council to carry out the duties listed in s 32(1). It went on to say [2 NZRMA 497, 541] —

> However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in s 32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references.

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a

matter of law in holding that s 290 did not apply and in determining that it was not itself required to discharge the s 32 duties.

The Tribunal also held that s 293 of the RMA, unlike s 290, was applicable and that it had the powers conferred thereby. Section 293 (in part) is as follows:

> **Tribunal may order change to policy statements and plans** — (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

Although s 293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for s 293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by s 293 in respect of a proposed change as well as those conferred by cl 15(2) of the First Schedule. That clause is as follows —

> (2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by s 293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that ss 290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in s 293 but instead on its jurisdiction under cl 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of s 32. He submitted that even if the Tribunal had the duties under s 32 of the council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to ss 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it

correctly determined that it had the powers conferred by s 293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to cl 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to s 290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect, an appeal, from the decision of the council. In addition, the provisions in cl 15(2) that a reference of the sort involved here is an "appeal" and a reference into a regional coastal plan pursuant to cl 15(3) is an "inquiry" link, by the terminology used, cl 15 in the First Schedule with s 290.

The general approach that the Tribunal has the same duties, powers and discretions as the council is not novel. Section 150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as s 290(1) and (2) of the RMA; in particular, s 150(1) provided that the Tribunal has the same "powers, duties, functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in *Waimea Residents Association Inc v Chelsea Investments Ltd* (High Court, Wellington M 616/81, 16 December 1981, Davison CJ). There was no provision in the TCPA corresponding to s 32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even though it had the same powers and duties as the council.

We accept Mr Gould's submission that even if the Tribunal had decided that s 290 applied and it had the same duties as the council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pp 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word "necessary" was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 and of Greig J in *Wainuiomata District Council v Local Government Commission* (High Court, Wellington CP 546/89, 20 September 1989).

The Tribunal considered that in s 32(1), "necessary" requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in s 32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential. We agree with that view and do not consider that the Tribunal was in error in law. We return now to the appellants' primary submission. It is true that the Tribunal said (at p 128) —

> On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change.

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. Section 32 is part only of the statutory framework; by s 74, a territorial authority is to prepare and change its district plan in accordance with its functions under s 31, the provisions of Part II, its duty under s 32 and any regulations. This was fully apprehended; and dealt with appropriately by the Tribunal. It said at p 127 —

> We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and areas; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achieve that purpose, and is in accordance with those functions under s 31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function.

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of s 32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the council to modify, delete or insert any provision which had been referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

> **Ground 19.** That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would result in adverse effects on the traffic environment.

Ground 20. In considering Plan Change No 6 in terms of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin District.

Ground 21. The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway.

Ground 22. In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect.

Ground 23. The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process.

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the council had not specifically stated the amendments sought and that was final because it had not been appealed. Reference was made to s 295 of the RMA, viz: "A decision of the Planning Tribunal . . . is final unless it is reheard under section 294 or appealed under section 299." It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure

adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under cl 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under s 293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in s 293(3).

On the penultimate page of its decision the Tribunal stated —

> The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N S Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address.

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under s 293 or cl 15(2) of the First Schedule.

In *Port Otago Limited v Dunedin City Council* (High Court, Dunedin AP 112/93) Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R 718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R 718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

Sections 300 to 307 of the RMA provide detailed procedure for the institution of appeals to this Court under s 299 and for the procedure up to the

date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court . We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in ss 300 to 307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the council are both entitled to costs. We shall receive memoranda from counsel if agreement can not be reached.

Solicitors for Foodstuffs: *Gallaway Haggitt Sinclair* (Dunedin)
for Countdown: *Duncan Cotterill* (Christchurch)
for Transit: *Timpany Walton* (Timaru)
for Woolworths: *Ellis Gould* (Auckland)
for Dunedin City Council: *Ross Dowling Marquet & Griffin* (Dunedin)

Westfield (New Zealand) Ltd v Hamilton City Council

High Court Hamilton CIV-2003-485-000953-54 & 56
17 March 2004
Fisher J

Resource consent — Threshold for imposing more stringent district plan controls — Appeal on a question of law — Broad value judgment required — Ultimate issue matter for evaluation — No requirement to consider effects afresh — Absent specific issues Court can rely on local authority evidence — Whether conditions precedent negate the grant of resource consent — Balancing competing considerations a matter of judgment — Challenge to conditions more appropriate during resource consent process — Scope of appeals to the Environment Court — Resource Management Act 1991, ss 3, 5, 31, 32, 74, 75(1), 76, 105, 292, 293, 299.

Westfield, Kiwi and Wengate lodged appeals pursuant to s 299 of the Resource Management Act 1991 ("the RMA") against the decision of the Environment Court regarding appeals from the Hamilton City Council relating to the proposed district plan and the zoning of land in the commercial services and industrial zones which provided for intensive retail shopping malls as controlled activities.

Westfield and Kiwi alleged that the decision was wrong in law because it: (a) overestimated the legal threshold required under s 32 of the RMA before a restrictive rule could be justified; (b) failed to conduct its own inquiry into adverse effects; (c) failed to take into account the desirability of public participation in the resource consent process; and (d) misused the type of activity (ie controlled activities) as a means of controlling adverse traffic effects. They argued that retail activities in the commercial services and industrial zones should be restricted, and that unrestricted retail activity would have adverse traffic and consequential effects. They considered that provision should be made for intensive retail shopping malls as discretionary activities.

Wengate alleged that the Environment Court had no jurisdiction to reinstate a buffer zone to manage reverse sensitivity between land zoned for commercial services and neighbouring industrial properties when reinstating the commercial services zoning of the subject land, because those changes fell outside the scope of the original appeal.

Held (dismissing the appeals):

(1) When considering whether more stringent controls should be imposed on retail activities in the commercial services and industrial zones the Environment Court had to be satisfied that such a rule would be "necessary" to achieve the purpose of the RMA. While "necessary" was a relatively strong word, a broad value judgment wasrequired when applying the test under s 32 of the RMA. When assessing whether any adverse effects of providing for retail activities justified imposing more stringent controls the Court was required to consider the likelihood of such effects arising (ie as a question of degree) in the particular case before it, and was entitled to approach the matter in robust terms. The ultimate issue for the Court to determine (ie the level of likelihood of adverse effects arising in practice) was a matter of evaluation rather than being subject to a specific evidential burden or standard (see para [34].

(2) The Environment Court was under a duty to undertake a broad-based survey of the relevant activities under ss 32 and 76 of the RMA when determining whether a rule in a proposed plan would promote the sustainable management of natural and physical resources, but absent specific issues being raised by the appellants it was not required to conduct the inquiry afresh and was entitled to rely on evidence of the investigations and conclusions of the local authority (see para [40].

(3) Striking the balance between public participation in the resource consent process and avoiding the delay and expense inherent in enabling competitors to contest resource consent applications was a matter of judgment for the Environment Court when considering whether adopting a particular rule was the most appropriate means of controlling the effects of development. The Court had considered this issue and had not ignored other competing considerations which it was required to take into account under s 32(1)(c)(ii) of the RMA. Accordingly, the decision to provide for retail activity within the relevant zones as a controlled activity did not involve any point of law (see para [45]).

(4) It would normally be premature to challenge provisions in a proposed district plan on the basis that invalid conditions would result from the adoption of such provisions. Any challenge to conditions should more appropriately be made during the resource consent process. The rules in the proposed district plan enabled the local authority to include conditions of the grant of resource consent to control the effects of development on the external roading network. As a result there was nothing objectionable in a condition precedent being included on the grant of consent to address matters that would otherwise be outside the applicant's control, therefore including such conditions in relation to controlled activities would not "negate the consent" and would not as a matter of general principle be invalid. Similarly, the impact of such conditions on development by making it too expensive or uneconomic to give effect to would not render a condition invalid (see para [53]).

(5) When requested to reconsider the zoning of land on appeal, the Environment Court's jurisdiction was not limited to the specific terms of the relief sought by the notice of appeal, but extended also to the inclusion of other rules in the proposed district plan (eg the buffer zone) which

could be foreseen as being associated with such rezoning. As a result reinstatement by the Court of the buffer zone between the Wengate site and neighbouring industrial properties to manage reverse sensitivity that could otherwise adversely affect the site was not unsurprising when determining that zoning of the site should revert to commercial services, as the buffer zone had originally been included in the proposed district plan as publicly notified. Accordingly, no procedural unfairness resulted to Wengate or any other person as reinstatement of the buffer zone would have been within the reasonable contemplation of those persons who were aware of the scope of the appeal (see paras [73], [75], [76].

Cases referred to in judgment

Applefields Ltd v Christchurch City Council [2003] NZRMA 1

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145

Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349

Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257 (CA)

Grampian Regional Council v City of Aberdeen (1983) P & CR 633 (HL)

Housing New Zealand Ltd v Waitakere City Council [2001] NZRMA 202 (CA)

Newbury District Council v Secretary of State for the Environment [1981] AC 578

Ngati Maru Iwi Authority v Auckland City Council (High Court, Auckland AP 18/02, 7 June 2002, Doogue J)

North Holdings Ltd v Rodney District Council (High Court, Auckland CIV 2002-404-002402, M1260-PL02, 11 September 2003, Venning J)

Northland Regional Council, Re (Environment Court, Auckland 12/99, 10 Februaery 1999, Judge Sheppard)

NZ Suncern Construction Ltd v Auckland City Council [1997] NZRMA 419

Ravensdown Growing Media Ltd v Southland Regional Council (Environment Court, Christchurch C 194/000, 5 December 2000, Judge Smith)

Residential Management Ltd v Papatoetoe City Council (Planning Tribunal , Auckland A 62/86, 29 July 1986, Judge Sheppard)

S and D McGregor v Rodney District Council (High Court, Auckland CIV 2003-485-1040, Harrison J)

Vivid Holdings Ltd, Re [1999] NZRMA 467

Williams and Purvis v Dunedin City Council (Environment Court, Christchurch C 22/02 Judge Smith)

Appeal

This was an appeal by Westfield (New Zealand) Ltd, Kiwi Property Management Ltd and Wengate Holdings Ltd, the appellants, on questions of law under s 299 of the RMA against the decision of the Environment Court which confirmed (in part) the decision of the Hamilton City

Council, the respondent, on submissions made on its proposed district plan.

C Whata and *M Baskett* for Westfield (New Zealand) Ltd
D Allan for Kiwi Property Management Ltd
S Menzies for Wengate Holdings Ltd
P Lang for the Hamilton City Council
D R Clay for National Trading Co Ltd
J Milne for Tainui Developments Ltd

FISHER J.

Introduction

[1] Most of Hamilton's retail activities are conducted in either the commercial centre or five smaller centres in the suburbs. The Hamilton City Council's proposed district plan provides for additional retail activity in the commercial services and industrial zones. The present appeals are directed to the additional retail activity proposed. The appeals are brought against a decision of the Environment Court of 27 March 2003 (A 45/03) upholding those aspects of the proposed plan.

Factual background

[2] Resource management in the city of Hamilton is currently governed by transitional and proposed district plans. The proposed district plan was notified in October 1999 and amended by council decisions in October 2001. It was then the subject of further council decisions of 29 January 2002. From the proposed plan as amended, the appellants took references to the Environment Court. With minor qualifications the Environment Court endorsed the proposed plan as amended. From the Environment Court decision the appellants have appealed to this Court alleging legal error on the Environment Court's part.

[3] Under the proposed plan, retailing is contemplated in four zones– central city, suburban centre, commercial services and industrial. Retailing is also possible in new growth areas. In contention in the present appeals are the commercial services and industrial zones.

[4] Commercial services zones are found on the fringe of the central city and in several locations elsewhere. Retailing there is intended to involve primarily vehicle-orientated activities including large-format shops, traffic-orientated services and outdoor retailing. With minor exceptions the zone restricts retailing to a gross leasable floor area of not less than 400 m^2. Any retail activity with an individual occupancy less than 400 m^2 is a controlled activity where it is part of an integrated development with a gross floor area greater than 5000 m^2 and where any occupancy of less than 400 m^2 faces onto an internal pedestrian or parking area and not onto a road. Any retail activity that generates traffic over a certain threshold becomes a controlled activity. The significance of designating a retail activity a controlled activity is that it provides the council with the power to impose conditions upon retail use of the land even though not permitting outright prohibition of such activity.

[5] In an industrial zone retail activities are restricted to a gross leasable floor area of less than 150 m^2 or greater than 1000 m^2, one retail

activity per site, and a minimum net site area of 1000 m^2. As with the commercial services zone, traffic consequences are controlled by making retail activities that generate traffic over a certain threshold controlled activities.

[6] Kiwi Property Management Ltd ("Kiwi") and Westfield (New Zealand) Ltd ("Westfield") argue that provision for retail activity in the commercial services and industrial zones ought to be curtailed in order to protect the viability of existing shopping centres in the city centre and Chartwell areas. They further argue that unrestricted retail activity in those zones would have adverse traffic effects. A particular focus was that in those zones, intensive retail shopping malls should be "discretionary activities", not "controlled activities".

Legislative background

[7] Section 74 of the Resource Management Act 1991 required the Hamilton City Council to prepare a district plan in accordance with ss 31 and 32 and Part II of the Act. Section 31 prescribes the council's functions in giving effect to the Act in the district plan. The functions include two of particular significance (all statutory references as they stood prior to an amendment in 2003):

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
> (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances.

[8] Of the provisions contained in Part II, s 5 needs to be quoted in full:

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[9] Finally, s 32 (1) sets out the council's duty in the following terms:

> **32. Duties to consider alternatives, assess benefits and costs, etc** — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —

(a) Have regard to —
  (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —
  (i) Is necessary in achieving the purpose of this Act; and
  (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

Environment Court decision

[10] As mentioned, on appeal from the Hamilton City Council decisions Kiwi and Westfield argued that in commercial services and industrial zones intensive retail shopping malls should be discretionary as opposed to controlled. Two grounds were advanced. One was that such activity would have adverse effects on the transport infrastructure of Hamilton. The other was that there would be consequential redistribution effects upon existing retail activities elsewhere in the city.

[11] As to the transport infrastructure, a traffic expert called for the appellants, Mr Tuohey, considered that developments generating traffic movement beyond a certain threshold ought to be a discretionary activity in the commercial services zone. Contrary evidence was given by equivalent experts called by the council and Tainui Developments Ltd ("Tainui"). After traversing the merits of this evidence the Environment Court concluded that it preferred the latter witnesses. It considered that the potential for adverse traffic effects could be adequately controlled by making developments of this nature a controlled activity. The Court did not agree that imposing conditions adequate to control the potential for adverse traffic effects would invalidate any consent given.

[12] The second issue concerned consequential redistribution effects. The Court noted that s 74(3) precluded paying regard to trade competition per se but accepted that it could have regard to consequential social and economic effects. On the other hand, the Court considered that in the light of s 32 (1)(c) a rule or restriction could not be justified unless it was "necessary" in order to achieve the purposes of the Act.

[13] As to consequential effects, there was a similar conflict of evidence. The Court was critical of the evidence of Mr Tansley and

Mr Akehurst who predicted major adverse impacts on existing centres if new developments proceeded elsewhere. The Court preferred the contrary evidence of Messrs Donnelly, Speer, Keane and Warren. In particular, the Court found that the retail premises permitted by the proposed plan "may have some impact on trade at the existing centres but . . . the impact will not be sufficient to generate flow-on consequential effects" (para [148]). The Court accepted the evidence of Mr Speer that a "Chartwell-type development", ie an intensive retail shopping mall, in the commercial services or industrial zones was "more theoretical than real". The Court went on to say at para [150]:

> Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by Westfield and Kiwi and to a lesser extent Wengate, are not necessary to achieve sustainable management.

[14] On a separate issue, the Court noted that when the proposed plan had originally provided for a commercial services zone covering the Wengate Holdings Ltd ("Wengate") site it had required a buffer strip to manage reverse sensitivity. Consequent upon a council decision to rezone that area industrial, the special buffer had been deleted. In its 2002 resolutions the council agreed to support reversion to commercial services zoning for the site but made no overt reference to the buffer. A council witness before the Environment Court suggested that the buffer be reinstated. The Environment Court agreed with that suggestion and reimposed the buffer.

[15] From those decisions Kiwi, Westfield and Wengate now appeal.

Appeal principles

[16] Pursuant to s 299 of the Act, a party to proceedings before the Environment Court may appeal to the High Court only "on a point of law". The unsuccessful attempts of appellants to enlarge the jurisdiction has often been commented upon: see, for example, *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419; and *S and D McGregor v Rodney District Council* (High Court, Auckland, CIV-2003-485-1040, 24 February 2004, Harrison J) at para [1].

[17] Conventional points of law are relatively easy to identify. More complex is the relationship between law and fact. The only possible challenge to the original Court's finding as to a primary fact is that there had been no evidence to support it before the Court. The only possible challenge with respect to inferences is that on the primary facts found or accepted by the Court at first instance, the inference urged by the appellant was the only reasonably possible one. In these matters the Environment Court should be treated with special respect in its approach to matters lying within its particular areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 at p 353. As Harrison J recently pointed out in *McGregor v Rodney District Council*, Parliament has circumscribed rights of appeal from the Environment Court for the obvious reason that the Judges of that Court

are better equipped to address the merits of their determinations on subjects within their particular sphere of expertise.

Kiwi and Westfield appeals

[18] In this Court Kiwi and Westfield allege essentially four errors of law. They submit that the Environment Court:

(a) Overestimated the legal threshold required before a restrictive rule can be justified;
(b) Failed to conduct its own overarching inquiry into adverse effects;
(c) Failed to take into account the desirability of public participation; and
(d) Misused the controlled activity status as a means of controlling adverse traffic effects.

[19] In addition Mr Allan argued that the Environment Court "failed to take into consideration when assessing the potential for flow-on consequential effects to arise . . . the full range of activities provided for under the zoning provisions being promoted by the council including in particular the potential for a more intensive retail development than large format retail (characterised . . . as a 'Chartwell-type development')". I could not regard this as a question of law, quite apart from the fact that it was open to the Court to express, as it did, agreement with the evidence that "a Chartwell type development is more theoretical than real". Other issues originally flagged by the appellants, such as failure to consider whether controlled activity status was the most appropriate means, were not pursued at the hearing in this Court.

[20] The appeal was opposed by the Hamilton City Council as respondent along with two interested parties with land potentially affected by any change to the proposed plan, Tainui and National Trading Co Ltd ("National Trading").

[21] It will be convenient to proceed through the four identified legal issues in turn.

(a) Legal threshold required before a restrictive rule is justified

[22] Before the Environment Court Mr Whata submitted that his client merely had to show, on the balance of probabilities, that the retail impacts flowing from the liberal zoning proposed *may* be of such a scale as to adversely affect the function of existing centres, and that it was for the council and other supporting parties to show that impacts sufficient to generate adverse effects would never occur or were so remote as to be fanciful or so small as to be acceptable. He submitted that it was not sufficient for the council to simply assert that, on the balance of probabilities, adverse effects were unlikely to occur.

[23] The Environment Court did not accept that submission. It held that in accordance with s 32(1)(c) the council and the Court had to be satisfied that any rule was *necessary* in order to achieve the purpose of the Act before a restriction would be justified. The Court concluded:

> [83] We are required, among other things, under section 32(1)(a)(i) of the Act to have regard to the extent to which any plan provision is necessary in achieving the purpose of the Act. In our view, therefore, we are required to consider carefully the provisions of section 5 and the relevant provisions of Part II of the Act as they apply to the circumstances of this case. We are then, in accordance with section 32(1)(c)(i) and (ii) to determine on the evidence whether the restrictive provisions proposed are:
>
> (i) necessary in achieving the purpose of the Act; and
> (ii) the most appropriate means, having regard to efficiency and effectiveness relative to other means.
>
> [84] We are required to make a judgment in accordance with the wording of the statute. Whether regulatory control is necessary, will depend on the circumstances of each and every case. To impose on ourselves a rigid prescriptive rule, in addition to the statutory directions, would contain [sic] flexibility in the exercise of our judgment. What is required is a factually realistic appraisal in accordance with the Act, not to be circumscribed by unnecessary refinements.

[24] The Court described the word "necessary" as used in s 32(1) as "a relatively strong word" defined in the *Concise Oxford Dictionary* as "requiring to be done, achieved, etc; requisite; essential". It referred to statements from various authorities suggesting that the threshold is a high one:

- . . . evidence may show such a large adverse effect on people and communities that they are disabled from providing for themselves. [*Baker Boys v Christchurch City Council* [1998] NZRMA 433].
- we do accept that the decisions cited by counsel for Westfield support a general proposition that potentially high adverse effects on people and communities, or evidence of unacceptable externalities, should be taken into account in settling the provisions of district plans about new retailing activities. [*St Lukes Group Ltd v Auckland City Council* (Environment Court, Auckland A 132/01, 3 December 2001, Judge Sheppard).]
- The proposal would have "a serious and irreversible detrimental effect on the Upper Hutt CBD" which would be "gutted" with curtain rising on a "tumble weed street scene" [*Westfield (NZ) Ltd v Upper Hutt City Council* (Environment Court, Wellington W 44/01, 23 May 2001, Judge Treadwell).]

[25] In this Court the appellants submitted that in deciding whether more restrictive controls over retail activity were justified, the Environment Court had set the threshold too high. The first argument in support was that the dictionary definition of "necessary" adopted by the Environment Court set too stringent a standard. The appellants rightly pointed out by reference to authority that in s 32 "necessary" is not meant to indicate essential in any absolute sense but rather involves a value judgment. As was said by Cooke P in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at p 260 in this context, "'necessary' is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".

[26] Clearly there would have been an error of law if the Environment Court had refused to consider more stringent controls over

retailing in the affected zones unless unavoidable in an absolute sense. However, I do not read the judgment as indicating that any such approach was taken. As s 5 of the Act makes clear, choosing the regime that will best secure the optimum use of land is inescapably an exercise in very broad value judgments. These range across such intangible considerations as safety, health, and the social, economic, and cultural welfare of present and future generations. On a full reading of the Environment Court's decision there could be no suggestion that it approached its task in any other way. There is not the slightest suggestion that the Court would have refused more stringent controls unless shown to be necessary in the sense that oxygen is essential for the creation of water.

[27] It is true that at one point the Court referred to the *Concise Oxford Dictionary* definition "requiring to be done, achieved, etc; requisite; essential" but in my view the matter is not to be approached by dissecting individual words or phrases in isolation from the rest of the judgment. The judgment is replete with other expressions and assessments demonstrating that the necessity for more stringent controls was approached as a matter of broad degree. The Court described the word "necessary" as merely a "relatively" strong word. It also cited passages from authorities clearly pointing to broad value judgments, for example "a large adverse effect on people" and "potentially high adverse effects". At no point does the Court's evaluation of evidence suggest that the appellants were required to show that more stringent controls were "necessary" in any absolute sense.

[28] A related submission was that the Court erred legally in its finding that "Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by [the appellant] are not necessary to achieve sustainable management". The appellants contended that the Court ought to have turned its mind to the possibility that, even though unlikely, the possibility of adverse traffic effects or adverse consequential effects still warranted greater control. Mr Allan pointed out that pursuant to s 75(1), a district plan is to make provision for certain matters set out in Part II of the Second Schedule to the Act. Clause 1 of Part II requires that provision be made for any matter relating to the use of land including the control of "Any actual or potential effects of any use of land . . . " (cl 1(a)).

[29] Clearly Mr Allan was right to say that potential effects are to be taken into account as well as actual effects. That is inherent in the prospective nature of a district plan. Furthermore, "effect" is defined in s 3 of the Act to include not only potential effects of high probability but "any potential effect of low probability which has a high potential impact". The Environment Court concluded that the proposed provisions were unlikely to give rise to adverse traffic or consequential effects (para [150]). Mr Allan argued that it was illogical to proceed from that conclusion to the further conclusion that the changes to the proposed plan advocated by Westfield and Kiwi were unnecessary.

[30] I agree that a conclusion that adverse effects were unlikely did not lead inexorably to the conclusion that more stringent controls were unjustified. There remained an evaluative step between the two. The Court had to decide whether the level of likelihood, necessarily a question of degree, warranted more stringent controls.

[31] Three sentences before referring to the conclusion that adverse effects were "unlikely" the Court had said at para [148]:

> We therefore find that the retail premises of the plan as now supported by Council may have some impact on trade at the existing centres but that the impact will not be sufficient to generate flow-on consequential effects.

That in turn must be read in the context of the Court's earlier recognition that pursuant to s 74(3) the Court was not to have regard to trade competition (para [72]). Consequential effects were limited to flow-on effects as a result of adverse effects on trade competition.

[32] Reading paras [148] and [150] together, therefore, it becomes clear that the Court regarded the possibility of relevant adverse effects as minimal, if not negligible. Paragraph [148] is expressed as an unqualified negative. Para [150] changes the language to "unlikely". In relation to traffic, the Court had already accepted the conclusion of Mr Bielby that the Hamilton city roading network "will be able to safely and efficiently cope with the volumes and patterns of traffic that will result from additional commercial development in North Te Rapa and in industrial areas" (paras [62] and [63]). So it was after expressing unqualified negatives in relation to both traffic and consequential effects that the Court went on to refer to such effects as "unlikely" and its conclusion that the changes advocated for by the appellants were unnecessary.

[33] On appeal there is always a temptation to pick upon each word and phrase in the judgment appealed from and subject it to microscopic examination. What really matters is the underlying reasoning. Given the time which the Court devoted to the reasons for its ultimate conclusion that there would not be adverse effects, and the different wording used elsewhere, I can attach no significance to the use of the word "unlikely" in para [150].

[34] A final point is that when predicting future events in an area as complex as urban resource management, ultimate conclusions could never be anything more than opinions. When speaking of the future, the distinction between an absolute negative and the conclusion that something is "unlikely" is somewhat arbitrary. It is difficult to exclude most future events in a theoretical sense, at least events of the kind now under consideration. Of course the appellants are entitled to argue that provision ought to be made for potential effects, particularly those which have a high potential impact. But the Court was entitled to approach the matter in robust terms by effectively concluding that adverse consequences were so unlikely that further controls were not necessary. In my view that is what it did.

[35] On the same topic the appellants criticised the way in which the Court had approached the onus of proof. Mr Allan submitted that "the issue before the Environment Court was whether *on the balance of probabilities* implementation of the Council's proposed provisions *could*

give rise to consequential effects of significance" (emphasis added). In my view there are two difficulties in this argument. One is that it is a contradiction in terms to say that the Court was required to determine "on the balance of probabilities" whether provisions "could" give rise to consequential effects. The possibility that something "could" happen is clearly a lower threshold than the probability that it will occur. The tests are mutually exclusive.

[36] But more importantly it involves a confusion between two different concepts. Doogue J referred to this in the different context of applications under s 105 in *Ngati Maru Iwi Authority v Auckland City Council* (High Court, Auckland AP 18/02, 7 June 2002). In all applications under the Resource Management Act 1991 a distinction is to be drawn between a burden of proof relating to the facts on the one hand and ultimate issues as a matter of evaluation in accordance with the law on the other.

[37] I agree with Mr Whata that in the present context the two questions are "is there a risk?" and "does it need to be controlled?". What was required of the appellants was sufficient by way of evidence or argument to make the possibility of an adverse effect a live issue. Once there was a foundation for considering that possibility, it was for the Court to determine the level of likelihood as a question of fact and then, in the light of such conclusions, whether particular provisions were justified in the plan. But I can see no indication that the Environment Court did anything else.

[38] Mr Allan further submitted that it is not a requirement for a rule to be "necessary" for the purposes of s 32(1)(c) if the rule is supportable by reference to other resource management criteria. He pointed out that pursuant to s 75(1)(d) the district plan is to state "The methods . . . to be used to implement the policies, including any rules" which he took to indicate that rules would be required whether or not the "necessary" test is satisfied. In my view the word "any" in this context envisages the possibility that there will be no rules unless the rule is necessary in terms of s 32(1)(c)(i). Similarly, I accept that in making a rule a territorial authority is required by s 76(3) to have regard to actual or potential effects and that rules may provide for permitted activities as well as other forms of activities. But I do not take it from those provisions that all activities are prohibited unless a rule can be found to justify them. In our country citizens are free to do whatever they like so long as there is no law prohibiting it. Rules in district plans are no different in that respect. That is the reason for the principle established in s 32(1)(c)(i) that there is to be no rule unless it is *necessary* in achieving the purpose of the Act. Long may it continue.

(b) Failure to conduct own inquiry

[39] The appellants submitted that the Environment Court erred in considering only the question whether more restrictive rules were "necessary" for the purposes of s 32(1)(c)(i). In their submission the Court ought to have gone on to have regard to all the other factors adverted to in s 32(1)(a) and, for this purpose, to carry out the evaluation required under s 32(1)(b).

[40] I agree that in accordance with its duties under ss 32 and 76 the Court was required to conduct a broadly based survey of considerations relevant to the proposed retailing activities. It is also true that hearings in the Environment Court are rehearings conducted de novo. However the Court does not have to ignore the fact that council officers and the council had already covered the same ground. The evidence the council broadly conveyed to the Court regarding the council's own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.

(c) Failure to consider desirability of public participation

[41] Mr Whata submitted that the ability of competitors to oppose development by means of contesting applications for resource consent was a relevant factor for the purposes of s 32(1)(c)(ii) and that this had been overlooked by the Environment Court. By allowing the extended retail activities as a controlled activity the council was denying other members of the public the opportunity to participate. Others could have mounted an opposition if such activities had been made discretionary and therefore subject to public notification.

[42] The Environment Court had itself observed at para [152]) that the proposed plan would enable retail development unrestrained from the ability of competitors to oppose by contesting applications for resource consent. The Court pointed out that by this means the considerable delay and expense to which parties and the council would be involved could be avoided. The Court considered that a factor which fell within s 32(1)(c)(ii).

[43] Mr Whata contrasted this with the view expressed in the High Court in *North Holdings Ltd v Rodney District Council* (High Court, Auckland CIV-2002-404-002402 M1260-PL02, 11 September 2003, Venning J) at paras [25], [35] and [36] that in general the resource management process is to be public and participatory and that at least in the case before Venning J, the public interest in achieving sound resource management decisions was of greater importance than the prompt processing of applications.

[44] I respectfully agree that as a matter of general policy the resource management process is intended to be public and participatory. I see no reason to question the priority which that consideration was given over expedition in the *North Holdings* case. Of course, principles of this nature involve a value judgment to be exercised in relation to the content of each district plan in each case. Otherwise there would never be permitted or controlled activities in district plans.

[45] In the present case the council and the Environment Court considered that making intensive retail activity a controlled activity in the zones in question strikes the right balance between public participation and other resource management values. That was clearly a judgment for the council and Environment Court to make. In my view it does not

involve any point of law. The Environment Court did not ignore the many competing considerations which impact upon a decision of this nature. In para [152] the Court pointed to:

> extensive consultation and the commissioning of reports, both from Council officers and consultants. Following that process, the Council considered that to impose restrictions was not necessary for the control of consequential effects. It would have instead had the effect of inhibiting trade competition. The plan provisions as now espoused by Council enable retail development within the city of Hamilton unrestrained from the ability of competitors to oppose development by means of contesting applications for resource consents. A practice, the evidence showed, that in the past caused considerable delays, at expense not only to the parties involved, but also to Council.

[46] Clearly the Environment Court has considered the issue of public opposition. In this case it preferred the equally valid and competing consideration that the rule should be the most appropriate means of exercising the rule-making function having regard to its efficiency and effectiveness relative to other means (s 32(1)(c)(ii)). That was a choice the Court was entitled to make.

(d) Misuse of controlled activity status as the means of controlling adverse traffic effects

[47] The fourth ground of appeal to this Court was that the power to impose conditions pursuant to the classification of retail activities as controlled activities was not a valid means of avoiding adverse traffic effects in that the conditions which would need to be imposed would nullify the consents ostensibly given. The argument rests on the assumption that the conditions would be either so onerous as to remove the substance of the consent or would be dependent upon the activities of third parties over whom the applicant for consent would have no control.

[48] The performance outcomes for the relevant activities are set out in rule 4.4.5(c) of the proposed district plan in relation to commercial services zones and rule 4.5.5(c) in relation to industrial zones. In both cases the council can impose conditions when consenting to a controlled activity. The conditions can relate to traffic requirements within the applicant's immediate control in that they relate to car parking, access to and from the adjacent road network, access to major arterial roads and internal vehicular layout. But equally the rules provide for the conditions to relate to the impact upon the external roading network with respect to access, traffic volumes and traffic capacity (see traffic engineering study required under rules 4.4.3(e) or (f) and 4.5.3(f) or (g)).

[49] Rules 4.4.3(f) and 4.5.3(g) also provide that where any activity requires preparation of a traffic impact study the provisions of rule 6.4.5 relating to roading contributions is to apply. Rule 6.4.5(a)(iii) provides that in exercising any discretion available under rule 6.1.4(e) (no doubt intending to refer to (d), the council may require the provision of new roads, the upgrading of existing roads, or the payment of a levy as a condition. Rule 6.1.4(d)(ii) authorises the imposition of such conditions in

a number of circumstances including a commercial development where the value of the work exceeds $250,000.

[50] A distinctive characteristic of a controlled activity is, of course, that the council may not decline consent to a proposed activity; it can merely impose appropriate conditions. The appellant's argument is that the control necessary to avoid unacceptable adverse traffic effects requires that the council be given powers which extend beyond the mere imposition of conditions upon a consent that must be given.

[51] The Environment Court dealt with this issue in the following way:

> [64] It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
> [65] It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an appellant has to pay for implementing a resource consent in certain circumstances.
> [66] It was further argued, that any condition arising out of the controlled activity status on traffic matters, may well require a third party, such as Transit New Zealand, to be involved. This may well be so. However we do not consider a condition precedent to any retail activity commencing, and involving a third party such as Transit New Zealand Limited to be invalid.
> [67] Counsel also raised the issue, of the ability of the Council to impose conditions on one developer effectively to take account of cumulative traffic effects arising from a series of developments. However, in our view, this does not give rise to any legal difficulty either. Any developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. A developer will be required to ensure that the traffic impacts of the proposed development are able to be appropriately accommodated by the roading network. Both Mr Bielby and Mr Winter were satisfied that the roading network, given the provisions in the proposed plan as espoused by the Council's latest position, could adequately cope with future development.
> [68] As pointed out by Mr Cooper the concerns raised by Kiwi and Westfield on traffic issues would be met by making retailing activities, restricted discretionary activities, with the matters over which the Council's discretion is reserved being restricted to traffic related matters. However, having regard to the evidence of Mr Bielby, and Mr Winter, which we prefer to the evidence of Mr Tuohey, and where it conflicts, with Mr Harries' testimony, we do not consider it necessary to amend the provisions to restricted discretionary activity status.

[52] As a preliminary point Mr Allan argued that although the rules clearly provided for conditions relating to internal features of the development site, it was not clear that the council would have the power to impose conditions relating to impact on traffic flows exterior to the

appellants's site. Mr Allan submitted that although the exterior matters were clearly included in the "traffic impact study" required in such circumstances, it did not follow that the council had the power to impose conditions relating to such matters. I accept the response of Mr Lang and Mr Milne that the rules do contain the power to impose positive conditions arising out of the needs demonstrated in the traffic impact study. By virtue of the power to require "roading contributions" in terms of rule 6.4.5, the council gains access to the incidental powers to require the provision of new roads, or the upgrading of existing roads, as alternatives to the payment of levies simpliciter.

[53] The appellants' principal argument, however, was that any conditions imposed in that respect would or might be legally invalid since the appellants would be powerless to bring about the requisite changes in roads on property beyond their own control. This lack of power was said to "negate the consent". The appellants further pointed out that the approval of the roading authorities, whether the council or Transit New Zealand, would place compliance with the condition beyond the control of the appellants.

[54] I agree that the power to impose conditions for resource management consent is not unfettered. The conditions must be for a resource management purpose, relate to the development in question, and not be so unreasonable that Parliament could not have had them within contemplation: see, for example, *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[55] Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via a 4.8 m wide strip when access to the applicant's property was in fact possible only through an existing strip with a width of only 3.7 m: *Residential Management Ltd v Papatoetoe City Council* (Planning Tribunal, Auckland A 62/86, 29 July 1986, Judge Sheppard); and see further *Ravensdown Growing Media Ltd v Southland Regional Council* (Environment Court, Christchurch C 194/00, 5 December 2000, Judge Smith).

[56] On the other hand, a condition precedent which defers the opportunity for the applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: *Grampian Regional Council v City of Aberdeen* (1983) P & CR 633 at 636 (HL).

[57] In the present case the Appellants' main argument appears to be that the district plan contains invalid or unacceptable rules in that adverse traffic effects could be addressed only by imposing invalid conditions. Mr Allan submitted that "the Court has conflated the general validity of the content of a resource consent condition and whether or not, in the context of a particular proposal, that condition practically negates the

consent, is impractical to fulfil, or frustrates the consent". Mr Whata acknowledged that, as in the case of *Grampian Regional Council*, "it may be appropriate to impose a condition that requirps significant works to be undertaken prior to the commencement of the consented activity" but went on to submit that "This is no more than a statement about the validity of conditions precedent to carrying out an activity . . . it is quite another matter to adopt as a method in a district plan, control of all traffic effects by a way of controlled activity status and the imposition of conditions precedent that may blight an otherwise legitimate development".

[58] Wherever there is power to impose conditions there must be the potential for the territorial authority in question to impose invalid conditions. In the normal course any challenge to the conditions must await the specific case in question. It would normally be premature to challenge the district plan itself on the basis that the imposition of invalid conditions under it can be foreseen as a possibility.

[59] Of course it would be different if it could be postulated that consents could not be given to certain permitted activities without the imposition of invalid conditions. But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the appellants, it would be impossible for the Hamilton City Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in *Grampian*, namely that until a nearby arterial route was increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the appellants to contribute to the off-site roading development.

[60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed– see *Grampian* at p 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the council will have the power to impose valid conditions of the kind in question in this case.

[61] Mr Allan went on to submit that whether the potential for adverse traffic effects could be met by an appropriate condition, with the associated possibility that the further work or contribution required might make the development too expensive, would be a matter of fact and degree to be determined in each particular case. He submitted:

> It will be in part a function of the relationship between the scale of the work and expense required by a condition and the scale and nature of the activity for which consent has been sought. An activity which is of a relatively modest scale but which involves the generation of additional (cumulative) traffic effects that, given the traffic conditions at the time, require significant

works on the roading network, may in practice be rendered uneconomic by those works and effectively be rendered incapable of being carried out.

[62] I would not have thought that the imposition of a condition that would make a development uneconomic could normally qualify as incapable of performance for invalidity purposes. But even if that were so, the invalidity would attach to the particular condition in question, not to the district plan itself. It cannot be postulated that merely because a power could be used in an invalid manner, creation of the power itself is invalid.

[63] The last argument was developed by both Mr Allan and Mr Whata in relation to the hapless small developer who finds that, due to large developments which have already used up the remaining capacity of the surrounding roading network, the small developer's proposal requires a roading upgrade which is beyond the economic capacity of the smaller developer. Mr Whata coupled that with the need for opportunity for public opposition to the developments that had preceded it.

[64] I agree with the Environment Court that a developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. This applies to developments and activities in many contexts other than traffic effects. I can see its relevance as an argument in support of public notification as one of the relevant values. But it could not be elevated to the notion that any condition required at any given time in relation to any particular development might be invalid simply because the developer in question happens to take adverse traffic effects over a threshold beyond which an expensive upgrade is required.

[65] I have already referred to the opportunity for public participation as merely a number of the competing values which impact upon the way in which the district plan was drafted. The choice between those competing values was eminently one for the Environment Court. Similarly the question whether controlled activity status for retail activities of this sort was the best way of addressing the potential for adverse traffic effects is not a question of law. It was a resource management question for the Environment Court alone.

[66] My conclusion is that the fourth and final argument on the appeals by Kiwi and Westfield fails.

The Wengate appeal

[67] The Wengate site was zoned commercial services under the proposed plan as originally notified. In rule 4.4.3 (g) the plan provided for a special buffer zone between buildings on the Wengate site and adjacent industrial properties. The buffer was imposed to manage reverse sensitivity which might otherwise have impacted upon the Wengate site.

[68] When the Wengate site was rezoned industrial by the council decision of October 2001, the special buffer zone relating to the Wengate site was deleted. In its subsequent 2002 decision the council agreed to support reversion to the original commiercial services zoning for the Wengate site but without overt reference to the associated buffer zone. The Environment Court reinstated the buffer zone. It did so on evidence from the council which the Court described in the following terms:

> [160] Mr Harkness also pointed out that the proposed plan as notified contained rule 4.4.3(g)– Special Buffer– Te Kowhai– to manage reverse sensitivity concerns for the Wengate site. This rule was deleted by Council when the site was to be zoned as Industrial. He suggested it be reinstated– a suggestion we agree with.

[69] On appeal to this Court, Mr Menzies submitted for Wengate that the Environment Court lacked the jurisdiction to reinstate the buffer zone. He submitted that the question of a buffer zone was not the subject of any reference before the Environment Court, and that to rule on an issue not referred to the Environment Court was an error of law.

[70] Mr Menzies pointed to a number of decisions in which the Environment Court accepted that it could not make changes to a plan where those changes were outside the scope of the reference to it and could not fit within the criteria in ss 292 and 293 of the Act. They included *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1; *Williams and Purvis v Dunedin City Council* (Environment Court, Christchurch C22/02, 21 February 2002, Judge Smith); *Re an application by Northland Regional Council* (Environment Court, Auckland A 12/99, 10 February 1999, Judge Sheppard); and *Re Vivid Holdings Ltd* [1999] NZRMA 467.

[71] Wengate's challenge to the Environment Court imposition of the buffer zone is based solely upon lack of jurisdiction. Mr Menzies submitted that the Environment Court was limited in its jurisdiction to the specific references before the Environment Court. The only reference before the Environment Court relevantly touching upon the Wengate land was the reference emanating from Wengate itself. Before the Environment Court Wengate merely sought the endorsement of the council's latest position that the commercial services zone should extend to the Wengate site. It did not ask that in confirming a commercial services zoning for the Wengate site the Environment Court should reinstate the original buffer zone. Mr Menzies submitted that since the Environment Court's jurisdiction was limited to the matters specifically brought before it, the Court had acted beyond its jurisdiction. He submitted that this constituted an appealable error of law.

[72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams* and *Purvis*, and *Vivid*.

[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed

changes would *not* have been within the reasonable contemplation of those who saw the scope of the original reference.

[75] In the present case, it is reasonable to infer that the buffer zone was originally introduced to address environmental effects between industrial zone land and commercial services zone land. That was relevant at a time when the Wengate site, with a commercial services zoning, was across the road from industrially zoned land. The concept of a buffer zone to address interactions between industrial and commercial services zones became redundant when the zoning of the Wengate site was changed to industrial. This changed back again, however, when Wengate successfully pursued a reversion to commercial services zoning. It is unsurprising that on accepting the Wengate position that its land should have the commercial services zoning reinstated, the Environment Court would reinstate the buffer zone that had originally been associated with that form of zoning.

[76] I cannot see that it was not reasonably foreseeable that in reinstating the original commercial services zoning the Environment Court would also reinstate the buffer zone that had been associated with it. It would be odd if an appellant could gain the zoning it sought without the restrictions which one would naturally tend to associate with zoning of that nature. As Mr Lang pointed out, Wengate's reference might have sought to omit not only rule 4.4.3(g), which imposed a buffer zone, but other rules governing activities within the commercial services zone. Taken to its logical extreme, if Wengate's argument regarding the jurisdictional limitations stemming from the scope of the reference were correct, the jurisdiction of the Environment Court would have been limited to reinstatement of the zoning without any of those associated rules.

[77] In my view the Environment Court must be taken to have had the jurisdiction to agree to the requested zoning subject to imposition of other rules foreseeably associated with such zoning. A buffer zone was in that category. It follows that the Environment Court had jurisdiction to reinstate the buffer zone.

[78] The point of law brought before this Court by Wengate was limited to the question whether the Environment Court erred in law in its assumption of jurisdiction to reinstate rule 4.4.3(g) relating to the buffer zone. I have already decided that question against Wengate. However, I note in passing that the only evidence before the Environment Court on that subject was that of Mr Harkness. The dimensions of the buffer zone suggested in his evidence were more modest than those imposed. He suggested that 5 m may well have been sufficient for the width of the buffer zone as distinct from the 10 m specified in the original buffer zone and reinstated by the Environment Court. Further discussion between Wengate and the council may result in some voluntary modification of the dimensions involved but it is clearly outside the scope of this appeal.

Result

[79] All appeals are dismissed.

[80] It was agreed by counsel at the hearing that costs would follow the event on a scale 2B basis. It follows that the three appellants,

Westfield, Kiwi and Wengate, must pay costs to the respondent, the Hamilton City Council, according to scale 2B.

[81] No oral submissions were made with respect to the costs liability of the appellants to Tainui and National Trading. I would hope that these could be resolved by agreement. If necessary they will need to be the subject of written memoranda and a ruling by another Judge. To deal with that eventuality, and also any disagreement between the appellants and the respondent as to costs details, I direct that: (a) within three weeks of the delivery of this judgment all parties claiming costs must file and serve memoranda setting out the terms of their claims; (b) the appellants will have a further two weeks within which to file memoranda in opposition; and (c) the claimants will have a further ten days within which to file any memoranda in reply.

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 120

IN THE MATTER of appeals under Clause 14(1) of the First Schedule of the Resource Management Act 1991 **(the Act)**

BETWEEN

GAVIN H WALLACE LIMITED
(ENV-2009-AKL-000505)
(ENV-2010-AKL-000011)
(ENV-2010-AKL-000031)

MAKAURAU MARAE MAORI TRUST BOARD INCORPORATED
(ENV-2010-AKL-000024)
(ENV-2010-AKL-000027)

THE TRUSTEES OF THE ERNEST ELLETT RYEGRASS TRUST AND OTHERS
(ENV-2010-AKL-000030)
(ENV-2010-AKL-000147)

EVELYN MENDELSSOHN (BY THE EXECUTORS OF HER ESTATE)
(ENV-2009-AKL-000502)

Appellants

AND

AUCKLAND COUNCIL (as successor to Auckland Regional Council and Manukau City Council)

Respondent

Hearing: At Auckland, 28 November – 2 December 2011, 5 – 8 December 2011, 26 – 29 March 2012, 4 May 2012

Court: Environment Judge R G Whiting
Environment Commissioner M Oliver
Environment Commissioner K Prime

Counsel: Ms M J Dickey & Mr M C Allan for Auckland Council **(the Council)**
Mr P Cavanagh QC for The Trustees of the Ernest Ellett Ryegrass Trust and Others **(the Ellett Interests)**
Mr K R M Littlejohn for Evelyn Mendelssohn (by the Executors of her Estate) **(the Mendelssohn Estate)**
Mr M E Casey QC and Ms A J Davidson for Gavin H Wallace Limited **(Gavin H Wallace)**
Mr R B Enright for Makaurau Marae Maori Trust Board Incorporated and Te Kawerau Iwi Tribal Authority Incorporated (s 274 party) **(the Maori Appellants)**
Ms J Bain for the New Zealand Transport Agency (NZTA) (s 274 party)

DECISION OF THE ENVIRONMENT COURT

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;
- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

ii. Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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REASONS FOR THE DECISION

INTRODUCTION

[2] This hearing concerned appeals against three planning instruments that relate to an area at the end of the Ihumātao Peninsula encompassing land to the west of Oruarangi Road and to the west of Auckland International Airport. The area was termed in the evidence as the *Western Gateway Area.* The Ihumātao Peninsula generally forms part of what is referred to as the *Mangere Gateway Heritage Area* (**MGHA**).

[3] The MGHA has recently come under increasing development pressure for a number of reasons, including:[1]

[a] Continued expansion at Auckland International Airport, including the proposed second runway, and expansion of airport commercial activities to the north of the second runway as provided for under the Airport Designation;

[b] The associated need to plan for the realignment of several public roads which will be affected by the development of the second runway;

[c] The upgrading of the Mangere Wastewater Treatment Plant and the establishment of an Odour Buffer Area, which creates the opportunity for potential development of land for business purposes in the Kirkbride Road area;

[d] The rapid development of business land in the vicinity of the Airport, and of the emerging shortage of business land available in Auckland, particularly for large-scale business uses such as distribution activities and warehousing in close proximity to major transport infrastructure; and

[e] The desire by the Council to reduce employment related trips out of the Mangere area by increasing employment opportunities within the MGHA.

[1] Reaburn, EIC, at [5.3]

[4] As a consequence of the development pressure, the then Manukau City Council initiated Plan Change 14 (**PC14**) which introduced urban zones – the Airport Activities Zone and the Mangere Gateway Business Zone. To accommodate PC14, the Manukau City Council applied to the then Auckland Regional Council for a change to the Metropolitan Urban Limit (**MUL**). Change 13 to the Auckland Regional Policy Statement was notified to give effect to the MUL change. Both PC14 and Change 13 were notified on 18 October 2007.

[5] Following the Councils' decisions there were a number of appeals to this Court. All but the appeals which are the subject of this hearing have been settled resulting in consent orders. As a consequence, the MUL has been extended out to a line along Oruarangi Road. Thus, the subject land which is to the west of Oruarangi Road is outside the MUL.

[6] The appellants wish to have their land included within the MUL and some of the appellants have sought a change of zoning of their land from the current rural zoning.

[7] In addition to the current rural zoned land of the appellants, the land to the west of Oruarangi Road contains the Otuataua Stonefields Historic Reserve (**the Stonefields or OSHR**). To the west and north, the land is bounded by the Manukau Harbour coastline.

[8] It is accepted by all that the land to the west of Oruarangi Road, as is all the land in the MGHA, is of special significance to Maori and also contains important historical associations to post-European settlement.

[9] Recognising the cultural and historical significance of the area and to protect and preserve the public open space and landscape characteristics of the appellants' land and the neighbouring Stonefields, the former Manukau City Council issued a Notice of Requirement (**NOR**) over the appellants' land on 18 October 2007. The NOR was for "*Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes*".

[10] The Council released its decision on the NOR on 27 March 2009. The appellants' whose land is subject to the NOR have appealed and seek the removal of their land from the designation and its cancellation.

[11] There are thus three major issues:

[a] The line of the MUL;

[b] The appropriate zoning of the appellants' land; and

[c] The cancellation of the NOR.

[12] It was common ground that there is a close relationship between Change 13, PC14 and the NOR. Thus it was appropriate that they be considered together. Further, there were a number of matters where we heard disputed evidence which relate to all three, such as cultural, historical, landscape, and the planning context. We propose to deal with the general matters first before assessing the merits of the competing planning options.

THE APPELLANTS AND THE SUBJECT LAND

[13] We attach as **Appendix 1** a map produced by Mr Reaburn, planning consultant for the Council, which shows the subject land.

The land belonging to the Ellett Interests

[14] Mr Ellett's family have farmed land owned by the Ellett Interests for approximately 147 years. These interests include:

[a] Mr Ellett himself;

[b] the Ernest Ellett Ryegrass Trust;

[c] Scoria Sales Limited; and

[d] Johnston Trust Quarry.

Parcel 1 – Ernest Ellett Ryegrass Trust

[15] Parcel 1 is a 5.61ha site owned by the Trust. It is relatively flat pasture land bounded by the Manukau Harbour to the west, Parcel 7 (owned by the Mendelssohn Estate) to the east, and Ihumātao Road to the south. To the north it is bounded by the Stonefields. The Elletts originally owned part of the Stonefields which were acquired by the then Manukau City Council in 1999.

[16] The land is zoned *Mangere–Puhinui Rural* and is subject to the NOR. The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, the cancellation of the NOR, and that all the land be included within the MUL.

Parcel 2 – T R Ellett

[17] Parcel 2 is a 30.30ha site owned by Mr Ellett. It is generally rolling pasture land bounded by the Manukau Harbour to the west, and the Ellett land to the southeast. It is zoned *Mangere–Puhinui Rural.* The appellants seek a *Future Development (Ellett Holdings) Zone* or similar, and that all the land be included within the MUL.

Parcel 3 – Scoria Sales Limited & Parcel 4 – Johnston Trust

[18] Parcel 3 is a 24.58ha site owned by Scoria Sales Limited, Mr Ellett being the sole director. Parcel 4 is a 6.59ha site owned by the Trust. Together, these parcels contain an active quarrying operation. Parcel 3 adjoins the Ellett land to the north and extends to the coastal edge to the southwest. Parcel 4 adjoins land owned by the Auckland International Airport to the southeast, which has recently been designated for airport purposes. This land is zoned *Mangere–Puhinui Rural.* The appellants seek to rezone the land to *Future Development (Ellett Holdings) Zone*, or similar, and that all the land be included within the MUL.

Parcel 5 – T R Ellett

[19] Parcel 5 is a 14.2ha site owned by Mr Ellett. It is generally flat pasture land bounded by Ihumātao Road to the north, the quarry to the southwest, and other Ellett land to the northwest. This land is also zoned *Mangere–Puhinui Rural.* The appellants seek to have it rezoned *Future Development (Ellett Holdings) Zone*, or similar, and that it be included within the MUL.

Parcel 6 – T R Ellett

[20] Parcel 6 is a 0.45ha residential site owned by Mr Ellett, containing Mr Ellett's house. It is zoned *Mangere–Puhinui Rural.* The appellant seeks the same relief as the owners of Parcels 2 – 5.

The land belonging to the Mendelssohn Estate

Parcel 7 – E Mendelssohn Estate

[21] Parcel 7 is a 9.06ha site owned by the E C Mendelssohn Estate and has been in the Mendelssohn family for over 50 years. It is relatively flat pasture land bounded by Parcel 1 (owned by the Ellett Rygrass Trust) to the west, Ihumātao Road to the south, and the Stonefields to the north.

[22] The land was originally farmed as a 55 acre dairy block. A large part of the original farm was acquired by the then Manukau City Council in 1999 to form part of the Stonefields. The remaining 9.06ha of the land is subject to the NOR.

[23] The land is zoned *Mangere–Puhunui Rural*, but the Plan reserves a controlled activity subdivision opportunity for the land to be divided into two parcels, without which the subdivision would be non-complying. The subdivision entitlement was provided by Variation 5 as part of the agreement with the Manukau City Council acquiring the balance of the land for the Stonefields.

[24] The appellants seek the cancellation of the NOR. The Estate is not a participant in the Change 13 (MUL) or PC14 (Zoning) proceedings.

The land belonging to Gavin H Wallace

Parcel 8 (including the adjacent parcel) – Gavin H Wallace Limited

[25] Parcel 8 is a 24.2ha site owned by Gavin H Wallace Limited. The Wallace family have had a long association with the land for some 145 years. In 1999 a significant portion of the land was acquired by the then Manukau City Council for the Stonefields. This parcel is generally flat to gently rolling pasture land, bounded to the north by the Stonefields, and to the southeast by Oruarangi Road. This land is zoned *Mangere-Puhunui Rural* and is subject to the NOR.

[26] It will be noted from Appendix 1, that there is an adjacent parcel of land (identified as "Wallace") owned by Gavin H Wallace Limited which is also zoned *Mangere-Puhunui Rural*, but it is not included in the NOR. It is bounded on the east by the Papakainga Zone housing land. It was the intention of the Council to zone this adjacent parcel of land residential, but the proposal was not carried through to the notified version of PC14.

[27] By its appeal, Gavin H Wallace Limited challenged the decisions of the former Manukau City Council to designate its land, and of the former Regional Council to exclude the land from the MUL. At the hearing it was contended, subject to jurisdictional objections, that the appropriate zoning for this land was a Future Development Zone.

Other Parties

Makaurau Marae Maori Trust Board Incorporated (Makaurau)

[28] Makaurau filed two appeals relating to Change 13 (MUL) and PC14. The appeals challenged the decisions of the Auckland Regional Council and the Manukau District Council respectively. Settlement was reached on all matters, with the exception of the Western Gateway Area.

[29] Before us, Makaurau opposed any urban development on the subject land and any extension of the MUL to include the subject land.

Te Kawerau Iwi Tribal Authority Incorporated (Kawerau)

[30] Kawerau were a Section 274 party to the appeals relating to Change 13 and PC14. Before us, they also opposed any urban development on the subject land and any extension of the MUL to include the subject land.

The New Zealand Transport Agency (NZTA)

[31] The NZTA is a Section 274 party with respect to two of the appeals filed against Change 13 and PC14.

[32] The NZTA's principal concern was the potential traffic and transportation effects of the proposed re-zoning of land as Future Development Zone.

GENERAL MATTERS

[33] We now propose to deal with the general matters that pertain to all three planning instruments.

Statutory Framework

[34] Mr Reaburn, Mr Putt and Mr Jarvis (planning witnesses) analysed the rezoning of the land in terms of what is referred to as the ***Long Bay*** tests[2] and also as these are set out by the Court in ***Clevedon Cares***[3] for the post 2005 Amendment to the Resource Management Act 1991. Those cases set out fully the now well settled framework which begins with Sections 72 – 76 and incorporates, by reference, Sections 31 and 32.

[35] Those cases related only to district plan changes. In this case we are also considering a change to the Regional Policy Statement and hence Section 30 (Regional Functions) and Sections 59 – 62 (relating to Regional Policy Statements) are also relevant to the shift in the MUL.

[36] In terms of the NOR, Section 171(1) of the Act sets out a list of matters to have regard to when considering the effects on the environment of allowing the requirement.

[37] Finally, recognising the structure of the Act, Part 2 matters provide overarching directives to be considered in terms of all of the proposed planning provisions.

[38] We propose to discuss the relevant statutory provisions in more detail, where appropriate, when we deal with each of the proposed planning instruments.

Planning Documents

[39] In the Planners' Joint Witness Statement (JWS) it was agreed that the Auckland Regional Policy Statement (***ARPS***) and the Auckland Council District Plan (Manukau Section) (***District Plan***) contained the primary assessment framework for addressing the issues. The relevant provisions were included in the Agreed Bundle of

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[2] ***Long Bay Okura Great Parks Society Inc. v North Shore City Council***, A078/2008
[3] ***Clevedon Cares Incorporated & Ors v Manukau City Council*** [2010] NZEnvC211

documents prepared by the parties. Towards the end of the hearing Mr Reaburn provided an updated version of relevant provisions, particularly the recently operative version of Change 6 to the ARPS, as agreed in the Planners JWS.

[40] Reference was also made to provisions in the New Zealand Coastal Policy Statement (**NZCPS**) in relation to section 6(a) of the RMA and the natural character of the coastal environment, and to the Auckland Regional Plan: Coastal.

Auckland Regional Policy Statement (ARPS)

[41] The updated operative provisions provided to the Court were dated 21 March 2012. The Chapters referred to included:

[a] *Chapter 2 – Regional Overview and Strategic Direction, and in particular Sections 2.2 (The Setting – Auckland Today); 2.3 (The Auckland Regional Growth Strategy); and 2.6 (The Strategic Direction)*
Chapter 2 of the ARPS states that the function of that chapter is to integrate the management of the various components and specifically address growth and development issues. The subsequent chapters deal with the effects of growth and development on the natural and physical resources. These other chapters provide for the management of specific resources.

Subsequent chapters highlighted in this case were:

[b] *Chapter 3 – Matters of Significance to Iwi*
A suite of directions to give regional effect to the strong directions relating to Maori matters in Part 2 of the Act.

[c] *Chapter 6 – Heritage*
Directions aimed at protecting and providing for heritage matters as required by Part 2 of the Act.

[d] *Chapter 7 – Coastal Environment*
Directions relating to the preservation of the natural character of the coastal environment and protection from inappropriate development, and public access, as required by Part 2 of the Act.

Auckland Council District Plan (Manukau Operative Section)

[42] Relevant Chapters included in the Planners' JWS included:

[a] Chapter 2 – the City's Resources

[b] Chapter 3A – Tangata Whenua

[c] Chapter 6 – Heritage

[d] Chapter 16 – Future Development Areas

[e] Chapter 17.3 – Mangere-Puhinui Rural Area

[f] Chapter 17.13 – Mangere Gateway Heritage Area

[43] The District Plan provisions give effect to the NZCPS and the ARPS. Chapters 3A and 6 particularly recognise the significance to be accorded to Maori matters including the relationship of Tangata Whenua and their taonga, culture and traditions. The wide range of matters encompassed in the Act's definition of historic heritage is also recognised in Chapter 6. Many of these district-wide provisions are given local meaning in Chapter 17.13 – Mangere Gateway Heritage Area which contains extensive provisions detailing the significance of the area's heritage, public open space, social, cultural and natural resources and by reference to the comprehensive list of resources and features included in 17.13.1.1. Chapter 17.3 contains the current rural zone provisions applying to the subject land and Chapter 16 details the manner in which this District Plan identifies areas for future development and the structure planning process to be undertaken prior to specific zonings and development.

LANDSCAPE, CULTURE AND HERITAGE

[44] Two landscape architects gave evidence – Ms Absolum, called by the Council, and Mr Scott, called by the landowner appellants. As directed, the landscape architects caucused on 24 November 2011. As a consequence of the caucusing, they produced a joint landscape architect witness statement which set out the agreed key facts and the areas where agreement was reached.

Agreement Key Facts – Cultural, Heritage, Landscape and Context

[45] The following facts were agreed by the landscape architects:[4]

> **2 AGREED KEY FACTS**
>
> ...
>
> **Characteristics of the subject land**
>
> The majority of the land is within the Coastal Environment.
>
> The majority of the land has a gently rolling, subtle landform, with remnant volcanic cones within the OSHR and a working quarry on parcels 3 and 4, shown on Figure 1.
>
> The subject land is currently used for farming purposes, apart from the quarry, with public access provided for on the OSHR.
>
> The landscape character is open, rural, gently rolling with few buildings, extensive dry stone walling, scattered specimen trees, copses and shelterbelts. There are no permanent water courses on the subject land.
>
> The long history of occupation and use of the subject land, by both Maori and European settlers has left numerous tangible heritage features across the subject land.
>
> The history of occupation by Maori and European settlers has also left intangible associations and meanings ascribed to the land or parts of it. These are described in the evidence of other expert witnesses.
>
> **Context of the subject land**
>
> The land lies between the Manukau Harbour to the north-west, west and south-west, the Makaurau Marae and Papakainga to the north-east and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the south-east.
>
> The proposed Mangere Gateway Heritage Route passes along the boundary of the subject land and accesses the OSHR.
>
> Te Araroa Walkway passes through the subject land, utilising, the recently reinstated coastal edge of the OSHR.

[46] The cultural and heritage characteristics, although largely agreed, occupied a considerable amount of the evidence and deserves some comment. Mr Murdoch, a historian called by the Council, described how the wider Mangere-Puhunui area has rich human historical and cultural associations that have developed over eight centuries.

[47] He said:[5]

[4] Joint Landscape Architects Witness Statement
[5] Murdoch, EIC, at [3.1]

> 3.1 In my opinion the undeveloped Ihumātao portion of [the area] is collectively a cohesive cultural heritage landscape of regional significance ...

[48] Mr Murdoch then set out in some detail an historic narrative that identified both Maori and European associations with the land.

[49] We heard evidence from an archaeologist, Dr Clough. He described in detail the archaeological values of the area and concluded:[6]

> 9.1 In reviewing the archaeology and history of the general "Mangere Gateway Heritage Area", it is evident that this is a rich historic heritage landscape interweaving numerous strands of history from the earliest settlement of New Zealand, to the earliest European contact and beyond, incorporating evidence for pre-European subsistence and cultivation, the response of Maori to the introduction of European crops, animals and farming practices, for the activities of missionaries, and for those of early European farmers and their descendants still living on the land today.

[50] The Maori dimension is of particular importance. There was no dispute that the subject lands are part of a peninsula which has significance to Maori. We heard a considerable quantity of evidence telling us of the Maori perspective. A summary of that evidence is attached as **Appendix 2**.[7]

[51] As will be seen from **Appendix 2**, a number of Maori witnesses gave evidence at a special sitting of the Court on the Makaurau Marae. This included a statement of evidence by Te Warena Taua, chairman of Te Kauwerau Iwi Tribal Authority Incorporated. He outlined the Maori associations with the subject land. Importantly, Mr Taua identified a number of waahi tapu sites, some of which were situated on, or partly on, the subject land. These sites included:[8]

- The sacred mountain, Maungataketake, also known as Te Ihu a Mataoho;
- Ancient and contemporary (20th century) burials;
- Ancient and more recent (19th century) pa sites;
- Battle sites;
- Subterranean caverns that contain ancestral taonga –

...

[6] Clough, EIC, at [9.1]
[7] Appendix 2, headed "Summary of Evidence Relating to Maori Issues"
[8] Taua, EIC, at [31]

[52] He then said:[9]

> 33 Furthermore, given that the subject site is part of a wider network of sites of significance, and that it contains a number of interrelated waahi tapu, from the perspective of tangata whenua the subject area is considered waahi tapu in its entirety.

[53] We acknowledge Maori have strong associations to the land subject to these appeals and that there are particular sites of special significance. However, it is also clear from the evidence that Maori lived, worked, fought and played there. It was at all times a working and lived in landscape which seems incompatible with the whole area being of waahi tapu status.

[54] Mr Taua was cross-examined on this at the Marae. In our view his answers were general and not specific. He tended to exaggerate at times and habitually refused to make even the slightest concession. Even if the whole area is waahi tapu as he claimed, it is still a working and lived in landscape and the waahi tapu status needs to be considered in this context.

[55] Ms Absolum considered that the Ihumātao Peninsula, including the subject land, the Stonefields and the Papakainga constitutes a Heritage Landscape that is at least of regional and possibly national significance. She said:[10]

> 5.21 In my opinion the Ihumātao Peninsula, including the land subject to these appeals, the OSHR and Papakainga constitutes a heritage landscape that is of at least regional and possibly national significance. I base this opinion on the following evidence:
>
> - Both the archaeological and historical record indicate that the volcanic soils of the Ihumātao Peninsula were intensively cultivated over the generations, and that the resources of the adjoining marine environment provided a varied and bountiful harvest.
>
> - The only areas that were not cultivated were the defensive areas of the cone pa, the settlements themselves, and sacred burial areas, several of which lie within the NOR land and on the land surrounding Maungataketake.
>
> - The evidence of both Mr Murdoch and Dr Clough that the Wesleyan Mission Station, established in 1847, is significant as one of the few archaeologically intact mission sites on the Tamaki Isthmus that retains its rural context and farmstead.

[9] Taua, EIC, at [33]
[10] Absolum, EIC, at [5.21]

- Ihumātao retains a special place in the history of the Tainui people because of its direct association with Te Wherowhero and the foundation of the Kingitanga (Maori King Movement).

- The Ellett, Montgomerie (later Mendelssohn), Rennie and Wallace properties have a historical coherence in that they were all developed and farmed in a similar manner for well over a century, and remained in the ownership of the same families for most of this time.

- The large number of scheduled and listed heritage sites and items found in the area, and the range of early vernacular farm buildings, including barns and cowsheds, as well as an unusually large number of former windmill sites and cisterns.

- The high potential for archaeological remains surviving under the pasture throughout the subject land, particularly on the Ellett block (Parcels 2, 5 and 6).

- The archaeological, architectural, cultural, historic, scientific and technological values associated with the natural and physical resources of Ihumātao that relate to both the Maori and the European occupation and use of the land.

- The historic farmscape which, as well as the scheduled buildings, also contain the extensive 19th century dry stone wall field boundaries and a number of historic trees associated with existing and former house sites.

- The extensive regionally significant coastal edge which retains a high degree of natural character.

[56] It would appear from the Joint Witness Statement that there was disagreement between the landscape architects as to the extent to which the heritage, cultural and archaeological values identified by the expert witnesses, contribute to the subject land being identified as a heritage landscape. However, that apparent difference evaporated at the hearing.

[57] First, in his evidence Mr Scott acknowledged the basis of Ms Absolum's opinion.[11] He said:[12]

> 36 To this extent I support the respondent's evidence that the landscape (subject to these appeals) is dominated by its historical associations and its heritage features.

[11] Scott, EIC, at [35]
[12] Scott, EIC, at [36]

[58] He went even further in his evidence as is evidenced from this exchange from the Court:[13]

QUESTIONS FROM THE COURT:

Q. Mr Scott, listening to the cross-examination from Mr Allan and from Mr Enright, I got the clear impression that as far as you are concerned as an expert witness you are in agreement with the heritage and cultural values that have been, and archaeological values, that other witnesses had averred to?

A. Yes.

Q. And in fact you don't profess to have any of those areas of expertise?

A. No.

Q. And to the extent that there are cultural and archaeological and historical nodes in the subject land, you accept that to that extent it is a heritage landscape?

A. Yes.

Q. The next question is of course whether it is a heritage landscape which is elevated to a s 6 status, are you able to give an opinion on that?

A. I think it does have a s 6 status –

Q. Yes, thank you.

A. - yes. Well I'm sure it does, yes.

Q. You are therefore in complete agreement with Ms Absolum?

A. Yes.

Q. And you defer to Dr Clough and Mr Murdoch?

A. Yes.

Q. The difference between you and the other witnesses that I have mentioned is that it being a heritage landscape they say it should be conserved –

A. That's correct.

Q. - and conservation, total conservation should apply>

A. That's correct.

Q. Whereas you say no, some development should be allowed providing adequate protection is made for the heritage, historical, and archaeological values?

A. That is correct.

Q. So that's the difference between the two of you?

A. And it's more than protection. It's actually enhancement.

[13] Transcript, Volume 2, at pages 308 - 309

[59] Thus, there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. In addition to Ms Absolum, Mr Murdoch and Dr Clough sought that the Court determine the land, the subject of the appeals, to be part of a *Cultural Heritage Landscape*. And indeed, Mr Scott appeared to acquiesce to such a suggestion.

[60] The construct *Cultural Heritage Landscape* is of relatively recent origin. Its use as a concept in landscape analysis stems from a trial study conducted in Bannockburn, Central Otago, commonly referred to as the *Bannockburn Heritage Landscape Study* published in a monograph in September 2004.[14]

[61] The primary purpose of the Bannockburn Study was to trial a newly developed methodology for investigating heritage in a landscape scale. The monograph described its content:

> ***Identification.*** The study offers an understanding of the landscape both spatially and as it has evolved over time through human interaction. It identifies relationships between physical features in the land, both where these evolved simultaneously and where they evolved sequentially. It also provides information about the relationships between people and the landscape, both in the past and today. It attempts to identify key heritage features, stories and traditions in the Bannockburn landscape.

[62] It defines heritage landscape as:

> A **heritage landscape** is a landscape, or network of sites, which has heritage significance to communities, tangata whenua, and/or the nation.

[63] The authors of the monograph entered into a complex and detailed interdisciplinary methodology of spatial analysis, using connectivities between super-imposed layers of history.

[64] This division of the Court, although differently constituted, has held that it is open to us to find, on sufficiently probative evidence, that a landscape, or part of it, is a heritage landscape under Section 6(f) of the Act.[15] However, it was stressed that decision-makers should exercise a degree of caution before determining such a landscape to be a heritage or cultural landscape and to recognise the need to avoid

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[14] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004

[15] See ***Wairakei Valley Preservation Society Incorporated & Ors v Waitaki District Council & Otago Regional Council***, C58/09, at [224] – [231], and ***Clevedon Cares Incorporated v Manukau District Council***, NZEnvC211, 2010

double counting of Maori issues. Maori issues are specifically provided for in Sections 6(e), 7(a) and 8 of the Act.

[65] Another division of the Court, led by Judge Jackson, signalled the following note of caution:[16]

> [208] The phrase 'heritage landscape' is often used when speaking of the surroundings of historic heritage ... However, we consider this usage may be dangerous under the RMA where the word 'landscape' is used only in Section 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word 'landscape' is used generally in respect of section 6(f) of the Act.

[66] On reflection we have difficulty in endorsing the concept as part of the RMA process for a number of reasons, including:

[a] *Heritage Landscape* is not a concept referred to in the Act;

[b] Outstanding landscapes and features are protected from inappropriate subdivision use and development by Section 6(b) of the Act;

[c] Maori values are recognised and protected by Sections 6(e), 7(a) and 8 of the Act;

[d] Historic heritage is protected from inappropriate subdivision use and development by Section 6(f) of the Act; and

[e] There are also other important matters provided for in the Act that would apply, such as matters relating to amenity, indigenous vegetation, natural character and coastal environment, that may at times be relevant to a given situation.

[67] To introduce a new concept not recognised explicitly by the statute would in our view add to the already complex web of the Act and make matters more confusing.

[68] Suffice it to say therefore, that in this case there is no dispute as to the importance of the historical, cultural or heritage associations in the landscape. There

[16] ***Maniatoto Environmental Society Incorporated v Central Otago District Council***, C103/09, at [208]

is no dispute about the importance of the coastal edge. There is no dispute as to the open rural character and amenity.

[69] There is no dispute as to the context of the subject land. It lies between the Manukau Harbour to the northwest, west and southwest; the Makaurau Marae and Papakainga to the northeast; and recently rezoned and designated land which will, in due course, be developed for business development to the east and airport expansion to the southeast.

Areas of Disagreement

[70] What is disputed is the extent to which the acknowledged landscape, cultural and heritage values should prevent any prospect of the land being developed for urban purposes.

[71] On the one hand, the Council, supported by the Maori parties, with its suite of techniques, seek to protect landscape, heritage and amenity values by way of an overall development exclusion approach.[17] This suite of techniques will fundamentally lock up the land.

[72] On the other hand, Mr Scott identifies an opportunity to protect the sensitive characteristics of the subject land while enabling careful development through a long-term planning approach. He said:[18]

> 25 While, in my opinion, the subject land does comprise a relatively sensitive coastal and rural character, incorporating clear legibility of significant historic heritage and cultural values, therein also lies the opportunity. The opportunity, in my opinion, is that this is an appropriate time to reconsider this regressive landscape planning and management option in favour of a positive, creative and innovative approach to the long term planning and management of the subject land.

[73] Mr Scott pointed out that the current zoning enables some unacceptable development, particularly in relation to land coverage opportunities by built structures (e.g. greenhouses) given the heritage and landscape characteristics.[19] He also made the point that the subject land, in a landscape sense, is very much located within an urban context.[20] In addition to the obvious infrastructural focus of the Auckland

[17] Scott, EIC, at [24]
[18] Ibid, at [25]
[19] Ibid, at [24]
[20] Ibid, at [27]

Airport and its national importance as the nation's primary port, is the auxiliary business development provided for by PC14 and earlier District Plan zone changes on the eastern side of Oruarangi Road.[21] He concluded:[22]

> 30 I also recognise and support "fresh voices" communicating a new relevance to the current perception of the nation's landscapes, and how landscape is an important element to us all as individuals and as diverse and interacting different cultural and social groups and therefore as a society. **In this sense, I have no debate with much of the respondent's heritage and archaeological assessments, including many of the perceptions and assertions underlying the assessment of the landscape and visual issues. However, this does not require the land to be locked away.**
>
> *[our emphasis]*

[74] Mr Scott then undertook a detailed land use and landscape planning, design and management strategy which he put forward as "*a realistic development scenario*" [23] for the subject land. This strategy recognised the urban, coastal and open space contextual location; the biophysical, visual, cultural and heritage sensitivity of the land; and the effects of development. He concluded:[24]

> 119 ... This landscape is significant. The opportunity for the collective land holdings "sandwiched" between the two critical land use entities – the urban/infrastructural (airport and associated service industry) and the historic/heritage landscape of the OSHR – is yet to be imagined. Our view of the world can be too simple and so reductionist that we often avoid the exploration of loftier options. This is the interface of significant open space, heritage, private rural holdings and significant infrastructure.
>
> 120 In my opinion, to pause and preserve the NOR land as public open space does not do justice to the outstanding future use, development and management opportunity for the area. I support the requests for new zones and inclusion within the MUL as set out in the appellant's relief.

[75] Ms Absolum, Mr Murdoch and Dr Clough all supported the suite of techniques put forward by the Council to protect the subject land from development. Ms Absolum considered the protection of the land would:

> [a] be a perfect response to the relationship of the proposed heritage route and the Stonefields;[25]

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[21] Ibid, at [28]
[22] Ibid, at [30]
[23] Ibid, at [117]
[24] Ibid, at [119] – [120]
[25] Absolum, EIC, at [6.7]

[b] would ensure the retention of clear visual connections for the residents and visitors;[26]

[c] would enhance the interface between the business development zone to the east of Oruarangi Road and the Stonefields;[27] and

[d] would provide an open space frontage to the Stonefields which would ensure the open, expansive and strongly rural character of the Stonefields and enhance the relationship between the Stonefields and important heritage features.[28]

[76] In summary, Ms Absolum said:[29]

> 6.7 In summary, the NOR land forms the foreground of public views to the OSHR from the southern part of Oruarangi Road and from Ihumatao Road. As such, it complements the open pastoral character of the OSHR and in fact, carries many of the same landscape features, such as mature trees, stone boundary walls and grass paddocks. In order to protect the integrity of the OSHR it is appropriate to keep this foreground land similarly open and rural in character. In other words, the introduction of any sort of development on to the land, other than that directly related to the appreciation of the important cultural heritage characteristics of the OSHR and surrounding area, would be inappropriate.

[77] In her rebuttal evidence, Ms Absolum criticised the long-term planning approach of Mr Scott. She was of the view that despite Mr Scott's comprehensive descriptive material, at no point in his evidence does he demonstrate a causal link between his description of the subject land and its context and the Preliminary Development Opportunities exhibited to his evidence.[30]

[78] Ms Absolum concluded:[31]

> 2.20 In summary, by my reading of Mr Scott's evidence, he has concentrated his attention so strongly on the degree to which the landscape of the nine parcels of land has changed since human occupation of the area began, that he has lost sight of heritage, rural, open space and amenity values inherent in the landscape of today. While we both acknowledge the inevitable changes about to occur in the landscape context of the subject land, as a result of settled parts

[26] Ibid, at [6.3]
[27] Ibid, at [6.6]
[28] Ibid, at [6.6]
[29] Ibid, at [6.7]
[30] Absolum, Rebuttal Evidence, at [2.3]
[31] Ibid, at [2.20] – [2.21]

> of Plan Change 14 and the Airport expansion programme, Mr Scott has seen this as sufficient reason to propose extending intensive urban development across the appeal area.
>
> 2.21 I remain fundamentally opposed to this approach, because of the reasons set out in my evidence in chief.

[79] We do not agree with Ms Absolum's criticism that Mr Scott has lost sight of heritage, rural, open space and amenity values inherent in the landscape today. Those values do not necessarily mean that the landscape has to be protected from all urban type development. The Bannockburn Report, after finding the area was an important heritage landscape, then asked what the implications of such findings should be. Referring to the Conservation Act and ICOMOS, the authors observed:[32]

> The practice of conservation ... is usually applied to historic places which are limited in extent – most often a building or cluster of buildings, but occasionally a pa site or other archaeological feature. It has rarely, from our knowledge, been applied at a landscape scale except possibly where the entire area is managed for conservation purposes (e.g. Bendigo).
>
> ... We consider that it is unrealistic to expect the entire [Bannockburn] area to be 'conserved' (in the preservation sense), because it is a living landscape. People have always used the land to make a living and to live, and must be able to continue to do this. It is not possible to regard it simply as a heritage artefact – it is simultaneously a place in which people have social, economic, and cultural stakes. While there are particular features, nodes, networks, and spaces that may require a conservation approach, we believe that this is inappropriate for a whole landscape.

[80] That approach reflects the approach taken by Mr Scott. We consider that sympathetic development which protects specific heritage, cultural and historic values, and which does not detract from the Stonefields, could be undertaken under the right planning regime. Such a regime needs to ensure that the development would have to be such that the area remains an appropriate buffer to the Stonefields from the business development proposed to the east of Oruarangi Road. This would mean providing for areas of open space and protecting the coastal environment. Such a regime would reflect the fact that this is a living landscape.

Part 2 Assessment

[81] We need to be satisfied that such a finding is in accordance with the single purpose of the Act – sustainable management. This term is defined in Section 5 of the Act and that definition is informed by the remaining sections in Part 2.

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[32] Janet Stephenson, Heather Beauchop, and Peter Petchey, *Bannockburn Heritage Landscape Study*, Wellington, Department of Conservation, Te Papa Atawhai, 2004, at pages 100 - 101

[82] Part 2 of the Act involves an overall broad judgment of whether or not some form of constrained development promotes the sustainable management of natural and physical resources.

[83] In our view the protection afforded under Section 6 of the Act has been overstated by the Council witnesses. The protection is from *inappropriate subdivision, use, and development.*

[84] With regard to Section 6(a) of the Act, the protection is for the natural character of the coastal environment. A carefully and constrained development could be undertaken, that is sensitive to and protects the character of the coastal environment.

[85] The protection of Maori relationships under Section 6(e) of the Act is already largely provided for on the Stonefields Reserve. The evidence establishes that by far the majority of identified archaeological and Maori spiritual sites are located there. Those that are located on the subject land are more widely dispersed, and could be catered for by sensitive development. In fact, by cautious and thoughtful development, their status and historical association could be enhanced.

[86] Identified heritage values under Section 6(f) are similarly, in part, protected by the Stonefields Reserve. The heritage characteristics of the subject land could also be protected, provided the land is developed in a manner that is sympathetic to relevant heritage aspects.

[87] Amenity and landscape values could equally be accommodated by appropriate development. We discuss the parameters of such development later in this decision. We are satisfied that, subject to the constraints imposed by those parameters, and the need for them to be satisfied in any Plan Change or resource consent application, that future urban development could satisfy relevant directions contained in Sections 6, 7 and 8 of the Act.

[88] This would, unlike a development exclusion approach, enable the owners of the land to also provide their social and economic well-being in accordance with Section 5 of the Act. This would also enable the value of the land to reflect its potential for appropriate development.

Overall finding on Landscape, Culture and Heritage

[89] We therefore find that a degree of sensitive urban development, appropriately constrained, would better give effect to the single purpose of the Act, than a total restraint on future development. We discuss the appropriate constraints later in this decision.

SHOULD THE MUL BE EXTENDED?

[90] The ARPS, as amended by Change 6[33] provides for the containment of urban activities within the MUL. While *Urban Activities* and *Rural Activities* are defined in the Policy Statement, the case law[34] reflects a continuing debate as to what is an *Urban Activity* or a *Rural Activity*, and therefore allowed outside the MUL.

[91] The definition of MUL in the ARPS is:

> ... the boundary between the rural area and the urban area. The urban area includes both the existing built-up area and those areas committed for future urban expansion in conformity with the objectives and policies expressed in the Regional Development chapter of the RPS. The metropolitan urban limits are delineated on the Map Series 1, Sheets 1 – 20. Also see definitions of Urban area and Rural lands/area.

[92] The Strategic Policy of the ARPS provides a framework for limited extension to the MUL. Policies 2.6.2 provide the policy direction which is based upon not compromising the strategic direction of containment and intensification, supporting the integration of land use and transport, and avoiding adverse effects on the environment.[35]

[93] In accordance with *Methods 2.6.3 – Urban Containment*, the then Manukau City Council made a request to the Auckland Regional Council to change the ARPS which included, relevantly for these proceedings, extending the MUL northwards to include the Airport area and land to the north. The request was considered by the Regional Council on 27 August 2007. The Council agreed to accept the request in

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[33] Change 6 was made operative by the Council 21 March 2012

[34] See ***Roman Catholic Diocese of Auckland v Franklin District Council***, W61/04, 29 July 2004; ***Runciman Rural Protection Society Inc v Franklin District Council***, [2006] NZRMA 278; ***Roman Catholic Diocese of Auckland v Franklin District Council***, W18/07, 22 March 2007; ***Auckland Regional Council v Roman Catholic Diocese of Auckland***, [2008] NZRMA 409

[35] ARPS at page 2 – 32; *Reasons 2.6.4 – Urban Containment*

part, and Change 13 was notified on 18 October 2007 as a private change. The period for further submissions closed on 14 March 2008.

[94] A number of submissions sought that the Bianconi land (on the southeast side of Oruarangi Road) be included within the MUL, but the Council in its decision[36] decided not to include the land for the following reasons:[37]

> 4.26 We consider that the inclusion of this land in the MUL and its subsequent development will have adverse effects on the heritage resources of the area (including the Otuataua Stonefields) and will not appropriately provide for the relationship between the Makaurau Marae and its peoples relationship with their ancestral lands. We consider that the Makaurau Marae is a rare if not unique resource in the Auckland Region as its relationship with its ancestral land is largely intact. The surrounding land has not been significantly developed and we recognise that this relationship is under pressure from development in the airport area. We heard considerable evidence from the Marae about the importance of the Marae peoples' relationship with the area and its landscape that was not challenged in our view.

[95] Appeals were lodged by the Bianconi submitters, and consent orders were made, reflecting negotiated agreements, resulting in the land being brought within the MUL. The result is that the MUL line now follows Oruarangi Road. The land is thus identified for urban purposes and is now zoned *Mangere Gateway Business Zone*. This together with the expansion of the *Airport Zone*, the second runway and associated service industry development, now effectively creates a hard edge to the current open space patterns of the subject land – save for a small and, in our view, ineffective buffer area within the Bianconi land.[38]

[96] All of the land northwest of Oruarangi Road falls outside the MUL. This constitutes the land, the subject of these appeals, a small piece of land purchased by the Council to be used as a reserve contiguous to the Stonefields and the Stonefields Reserve itself.

[97] Of the appellants, the Ellett Interests and Gavin H Wallace submitted on Change 13 seeking that their land be included within the MUL. The Council in its decision decided not to include the land, for the following reasons:[39]

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[36] See Decision Report, 17 November 2009 at [4.23] – [4.29]
[37] At [4.26]
[38] See Scott EIC, at [7]
[39] At [4.36] - [4.39]

4.36 We are satisfied on the basis of the evidence that this land should remain outside of the MUL. We consider that urban development on this land has the potential to have adverse effects on the landscape and heritage values in the area.

4.37 We also consider that the inclusion of this land will have adverse effects on the heritage resources of the area and specifically on the relationship between the Makaurau Marae and its relationship (and their peoples' relationship) with their ancestral lands. We consider that the Makaurau Marae is a unique resource in the Auckland Region in that its relationship with its ancestral land is largely intact and we recognise that this relationship is under pressure from development in the Airport area. We heard considerable evidence from the Marae about this relationship that was not challenged in our view.

4.38 We also consider that the landscape values associated with the coastal edge in this area together with the location and relationship of the Otuataua Stonefields are such that inclusion of the land within the MUL is not warranted.

4.39 We are also satisfied that we were not presented with any convincing evidence concerning the need for this land to be included within the MUL and note that a portion of this land is used as a quarry, the consent for which has some time yet to run. This activity is not compatible with urban development in our view.

[98] Hence, the appeals to this Court.

[99] We note that the Council in its decision, assessed Change 13 against *Methods 2.6.3* of the ARPS, and the relevant comprehensive provisions of the ARPS. Importantly, it found:

[a] The Airport is regionally significant infrastructure;[40]

[b] Because of the synergistic nature of modern airports and the related need for a broader range of activities in the Airport area, it is appropriate that the land within the existing Airport zonings and designations should be within the MUL;[41]

[c] There is a recognised shortage of business land in Auckland, especially for activities that require large sized sites;[42]

[d] The Airport is an appropriate location for such activities;[43]

[40] At [4.2]
[41] At [4.2]
[42] At [4.3]

[e] Some expansion of the MUL is generally consistent with the criteria set out in the ARPS and Change 13;[44] and

[f] It is not appropriate to extend the MUL into the area south of the Stonefields (the Bianconi and appellant's land), as to do so would have the potential to have significant adverse effects on the Marae.[45]

[100] It is the findings from the Council's decision that relate to the subject land that form the basis of the appeals. Clearly, the Council's panel of Commissioners found that urban development on the land has the potential to have adverse effects on:

[a] Landscape and heritage values;

[b] The relationship of Maori with their ancestral lands;

[c] The landscape values of the coastal edges; and

[d] The Stonefields.

[101] It is not surprising, that before us, by far the bulk of the evidence was directed at the Maori values, heritage and landscape issues and whether a development exclusion approach should be adopted, or whether the subject land should be zoned to allow for some development while protecting the sensitivities of the landscape.

Current Zoning and Usage

[102] The land is currently zoned Mangere – Puhunui Rural. Apart from the quarry operation, the land is largely used for grazing. We are satisfied from the evidence[46] that the size of the holdings are such that the current use is far from economic.

[103] Mr Hollis, a farm management consultant and registered valuer, carried out an assessment of other land use options, including:

[a] Pastoral farming;

[43] At [4.3]
[44] At [4.5]
[45] At [4.7] – [4.10]
[46] See T R Ellett, EIC; R G Hollis, EIC; J Blackwell, EIC

[b] Dairy support;

[c] Arable;

[d] Intensive food production; and

[e] Sheep farming.

[104] We summarise his findings:

[a] Farming in such close proximity to urban development and the International Airport has significant limitations and liabilities;

[b] The scale of the activity also makes farming uneconomic;

[c] The obstacles to farming are not only financial, with high rates relative to marginal returns, but also a growing environment somewhat hostile to normal farming activities;

[d] There is no possible return on capital for any farming enterprise.

[105] He concluded:[47]

> The areas being considered are already isolated, almost trapped within an environment of urban development on one side, the harbour and Otuataua Stonefields on the other, each with their own constraints to good farming. This is not conducive to the land being utilised economically for primary production.
>
> It is my conclusion that the subject farms are uneconomic with no viability in the foreseeable future. At best their future is hobby farming only.

[106] While Mr Hollis was cross-examined, there was really no dent made on his findings, which were effectively incontestable. Further, if, as is the most feasible, some form of intensive farming was undertaken, this would give rise to large buildings, such as glasshouses, which would not ensure that an open space character would be retained on this land.

[107] We conclude that the farms are uneconomic with no viability in the foreseeable future. Clearly, with the advance north and west of the Airport related

[47] Hollis, EIC, at page 17

land to provide industrial and commercial support to the Airport, this pocket of existing rural land has become sandwiched between that expansion and the Stonefields and the coast. It is therefore an anomaly.

[108] We are satisfied on the evidence, that to keep this relatively small piece of land outside the MUL would affect its value considerably, to the detriment of the owners.

Protectionism v Sensitive Development

[109] We have already discussed this debate in some detail where we found that some form of urban development, sensitive to the special landscape characteristics of the land, could be undertaken. We discuss the bounds of such development in the next part of this decision.

[110] Suffice it to say, we found that the witnesses for the Council and Maori appellants were too narrowly and intensively focussed on the subject land's heritage, cultural, archaeological and landscape values. Other potential land use scenarios were not adequately analysed. In our view, the evidence of the Council and the Maori appellants has underplayed the scale of the Airport and commercial development in contrast to, what they considered to be the main determinant, the landscape and heritage matters.

[111] We agree with Mr Scott,[48] that the heritage route will be the future connection that opens this *cultural treasure* to public attention. Such an opportunity could be extended to accommodate a range of appropriate high quality development opportunities set within an open space framework that identifies and respects the heritage features. As we make clear in the next part of this decision, such opportunities need to be constrained by appropriate controls. We consider, keeping the land outside the MUL would be too constraining in view of the continuous debate as to what is, or is not, an *urban activity*.

Is the current MUL line defensible?

[112] Again, we agree with Mr Scott, that the MUL in its current location, creates an anomaly in landscape management and land use terms.[49] The MUL does not relate to physical constraints in the landscape, such as a coastal edge, mountain range or

[48] Scott, EIC, at [22]
[49] Ibid, EIC at [12]

prominent ridge. Its inherent instability is exacerbated by the difference in property value that is created by allowing development on one side of the line and not on the other. If the property values become significant, those outside the line inevitably strive to be included.

[113] We agree that the close proximity of the land to the nationally significant infrastructure of the Airport and other urban activities will further exacerbate the unstable nature of the MUL in this landscape.

[114] The most defensible line for the MUL in this area is the coastal edge. The Stonefields would be protected by its reserve designation. The landscape and heritage characteristics of the subject land could be protected by an appropriate zoning of the land. However, because of the jurisdictional difficulties raised by the Council,[50] we are limited in the scope of these appeals to extending the MUL to include the Ellett land and the Wallace land, unless we invoke Section 293 of the Act. We conclude that the MUL line should be extended to include all of the subject land, which also includes the Mendelssohn land for which a direction under Section 293 will be necessary.

Should a shift in the MUL be restricted without appropriate zoning in place?

[115] In her opening submissions, Ms Dickey, counsel for the Council, said:

> ... a shift in the MUL should ... be restricted where there is no clear evidence-based zoning proposed to accompany it.

[116] In reply, counsel for the Wallace interests quoted the following passage from an earlier decision of this division of the Court in ***Clevedon Cares***:[51]

> [96] We are satisfied, that looking at the ARPS as a whole, the clear direction is that new urban development outside of the MUL ... requires a two-fold procedure. A district plan change preceded or paralleled by a change to the ARPS which, if approved, would ... shift the MUL ... This two-fold procedure would reflect the integrated management approach envisaged by the ARPS.

[117] We think the position is as stated in that quote. There is no fundamental reason why a shift in the MUL should not precede a change of zoning. Nor is that

[50] The Ellett and Wallace appeals only sought the MUL to be extended to include their land. The land owned by the Council and zoned MPRZ (shown as Parcel 9 on the plan at Appendix 1 to this decision) is not part of the subject land.
[51] [2010] NZEnvC211 at [96]

approach unprecedented, with the Long Bay area having been brought within the MUL some years before the specific zonings for its development were devised.

[118] We agree with Mr Casey QC, that there are two main reasons why in this case it is appropriate that the MUL shift precede, rather than parallel, the zone change, namely:

[a] While the land is proposed to be brought within the MUL now, it is not proposed to be released for development immediately. It would be premature to write into the District Plan a highly specific structure plan when actual development might not take place for up to a decade. The particular details should be devised closer to the time when the receiving environment would be better known;

[b] The shift is not being pursued by the territorial authority, but by private land owners. Should we hold that the MUL cannot be shifted in the absence of what amounts to a fully developed structure plan exercise, it would place an insurmountable hurdle to anyone other than a Council to seek its extension; and

[c] We would add a third reason – namely, that the extension sought by the appellants arises out of Change 13 which has been preceded by the request sought by the then Manukau City Council in accordance with *Methods 2.6.3*.

Should there be a thorough assessment under Method 2.6.3.3?

[119] The general answer to this is yes. Method 2.6.3.3 is the springboard for a local authority to request a Change. It was the basis for the Council to make the request in 2007. The request was assessed by the Council before notifying Change 13. Method 2.6.3.3 was also assessed by the Commissioners appointed by the Council to hear Change 13 at the first instance hearing. The Council's decision, together with the analytical findings in the many reports that have been put before us, form the background of this hearing. There has been a cumulative aggregation of data which is available to us.

[120] The findings contained in the decision of the Council are generally accepted, save for the finding that the MUL should not extend beyond the line sought as notified

in Change 13. Even that finding has, in part, been compromised by the consent orders bringing the Bianconi land within the MUL.

[121] This leaves just the subject land in issue. The challenge to the Council's decision is focussed on one underlying issue – whether the sensitive landscape and heritage characteristics are such, that the land should be protected from any form of urban development.

[122] We are satisfied that we have sufficient information before us to make an informed decision on that fundamental issue.

Application of our findings in the context of Part 2 and the ARPS

[123] The whole focus of the ARPS, and indeed the RMA itself, is to ensure that decision makers give effect to the single purpose of the Act – sustainable management. As we have said, this term is defined in Section 5 of the Act and that definition is inferred by the remaining sections in Part 2.

[124] By achieving the purpose of the Act, any proposal would:

[a] Assist the Council to carry out its functions of achieving integrated management of the natural and physical resources of the region;

[b] Assist the council to carry out is functions in relation to any actual or potential effects of the use, development, or protection of land which is of regional significance; and

[c] Has a purpose of achieving the objectives and policies of the Regional Policy Statement.

[125] We are required to be satisfied that excluding the subject land from the MUL better achieves the purpose of the Act than bringing it within the MUL. This involves the balancing of the landowner's interests in providing for their social and economic well-being, and providing urban zoned land against locking the land up from any urban development to protect heritage and landscape characteristics.

[126] We are conscious of the strong directions contained in Part 2 protecting historic heritage from inappropriate development;[52] and recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.[53]

[127] These strong directions are emphasised in the Strategic Objectives and Policies and other provisions of the ARPS. However, we are satisfied that Maori values and heritage characteristics can be provided for and/or adequately protected by sensitive development with appropriate constraints. This will, at the same time, enable the landowners to provide for their social and economic needs in accordance with Section 5 of the Act. A need which cannot be achieved while this land has a rural zoning because appropriate rural uses are not a viable option.

[128] To keep the land outside the MUL, with a rural zoning, would without further constraints, offer less protection to the characteristics protected by Section 6(e) and (f) of the Act. To lock the land up might indeed provide for Maori and heritage values. But it would not provide for the economic needs and well-being of the owners. By allowing sensitive constrained development, heritage and landscape characteristics can be protected while at the same time allowing the owners to provide for their economic well-being.

[129] We are also conscious of the strong directions relating to amenity and the coastal environment in Part 2 of the Act. These directions are also emphasised in the provisions of the ARPS. Again, we are satisfied, that some urban type development with proper constraints could adequately satisfy those directions.

[130] We accordingly find that an extension of the MUL to include the subject land would reflect the sustainable management provisions provided for in the framework of Part 2 of the Act.

[131] We consider it appropriate for all the subject land to be so included. This means that the Mendelssohn land would need to be activated by a notification under Section 293 of the Act. Accordingly, we make such a direction.

[52] Section 6(f) of the Act
[53] Section 6(e) of the Act

Overall finding on MUL

[132] For the reasons given we find that the MUL should be extended to include the subject land. We direct the Council, under Section 293 of the Act, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Regional Policy Statement to amend the location of the MUL accordingly.

ZONING

Jurisdictional Matters

[133] As outlined earlier in this decision not all of the parties had requested a change to the zoning for all of the land.

[134] The appeals by the Ellett Interests sought a *Future Development (Ellett Holdings) Zone* or similar, for all of Parcels 1 to 6. The Planners' Joint Witness Statement[54] noted that the only direct rezoning outcome sought in appeals was in respect of the Ellett land south of Ihumātao Road, that is excluding Parcel 1 affected by the NOR. This reflected the submissions lodged with the Council which did not seek a change to the zoning of Parcel 1.

[135] The Mendelssohn appeal (Parcel 7) did not seek a change to the zoning.

[136] For the Wallace land (Parcel 8 and the adjacent land to the east) an amendment to the MUL notice of appeal was allowed by the Court to include a consequential prayer for relief that, should the Court decide to include the land within the MUL, the Court should then consider making;

> ... appropriate orders and/or directions as to the appropriate steps to re-zone the appellant's land.

[137] In its decision allowing the amendment the Court noted that the question of whether the Court had jurisdiction to make the order sought by the amendment was a matter to be decided at the substantive hearing.[55]

[138] In terms of the appeals filed the zoning options before us were to retain the current *Mangere –Puhinui Rural Zone (***MPRZ***)* on all of the land, or apply a *Future*

[54] Joint Witness Statement Planners, 8 November 2011, at [2]
[55] [2011] NZEnvC 336

Development (Ellett Holdings) Zone, or similar (**FDZ**), to some of the Ellett land (Parcels 2 -5).

[139] During closing submissions, in response to matters raised by the Court, all Counsel agreed that if the Court found that a zoning other than the current rural zone was appropriate for all of the subject land then Section 293 would be an appropriate way forward given the jurisdictional limitations.

[140] Therefore at this stage we propose to assess the appropriate zoning for all of the subject land affected by these appeals without being restricted by the jurisdictional limitations.

Zoning Evaluation

[141] The current MPRZ rules (Rule 17.3.10) allow, as a permitted activity, one household unit, farming, greenhouses, breeding and boarding of domestic pets, farmstay accommodation, horse riding clubs/schools, pig keeping, produce stalls, production forestry (more than 500m from the coast) and open space. The front yard requirement is 10 metres, the side and rear yards are 3 metres and the coastal setback is 30 metres. The height requirement is 9 metres. Building coverage is not controlled on sites over 5,000m^2, it is 10% for sites less than 5,000m^2.

[142] Mr Reaburn noted that under this rural zoning greenhouses are a potential use and that substantial greenhousing already exists in the area, although not on the subject land. He was concerned about substantial buildings for farming activities. Ms Absolum expressed similar concerns about the possibility of greenhouses.

[143] Mr Reaburn acknowledged that the current grazing activities may not be sustainable for much longer. He noted that the rural zoning potentially allows for significant building development. He considered that the major threat to the heritage, cultural, archaeological and landscape values would arise from more intensive development of the land.

[144] In terms of public access to the coast, the rural zoning only provides for enhanced access if subdivision occurs and Mr Reaburn confirmed that there are limited subdivision possibilities under the rural zoning for this land. Mr Reaburn also held concerns about whether the current MRPZ adequately addressed heritage,

cultural, archaeological and landscape values, noting in particular that the wahi tapu rules were weak.[56]

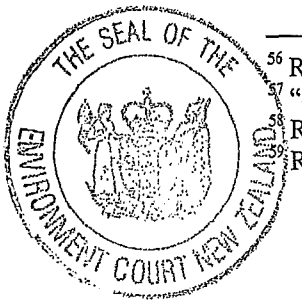
[145] Mr Reaburn advised that prior to his involvement in the plan change the Council had proposed zoning the land to FDZ. The section 32 report to PC 14 makes it clear that the then Manukau City Council's preference was for a wider area to be within the MUL and zoned for urban development. This included the Ellett land south of Ihumātao Road and the small part of the Wallace land adjacent to the Papakainga Zone. It did not include the NOR land. This expanded area was rejected by the then ARC. After lodging an appeal against the ARC decision the Manukau City Council decided to progress a reduced rezoning in line with the ARC decision rather than await the outcome of the appeal.[57]

[146] However in this hearing Mr Reaburn, whilst acknowledging the region's shortage of business land and the potential suitability of the subject land for business use from a "*purely physical and servicing point of view*"[58], stated that he

> ... came to the opinion, informed by my consultation, that the cultural, heritage and landscape values of this land made it inappropriate to continue with a Future Development Zone proposal.
>
> The same concerns have led me to the conclusion that re-zonings (and an associated MUL extension) to provide for an urban scale of development are not appropriate on any part of the land subject to these appeals. ... [59]

[147] Taking into account the research and reports which have culminated in the evidence presented at this hearing, Mr Putt proposed a FDZ as being more appropriate than the current MPRZ. In addition to a FDZ, primarily for the Ellett and Mendelssohn lands, Mr Putt also proposed specific zonings for other parts of the subject lands. This included the Main Residential Zone for the piece of Wallace land outside of the NOR and adjacent to the Papakainga Zone, and the Oruarangi Sub-Zone for the Wallace land affected by the NOR.

[148] A FDZ is already provided for in Chapter 16 of the District Plan. It is effectively a "holding" zone and it requires a structure plan to be prepared as the basis for a subsequent plan change and specific zoning provisions. The process is set out in



[56] Reaburn, EIC, at [8.5], [8.7], [9.5] – [9.7]
[57] "Special Note" at page 8
[58] Reaburn EIC at [8.8] and Rebuttal at [4.3(b)]
[59] Reaburn Rebuttal at [4.10] & [4.11]

Part 16.6.1.2 and has been used in a number of other parts of the Manuaku District to date.

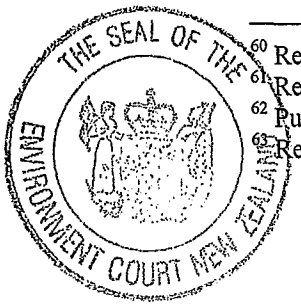
[149] We do not agree with Mr Reaburn when he states that the effects of urban zoning and development are almost certainly likely to be greater on the heritage, cultural, archaeological and landscape values of the subject area than would be the case with activities possible under the current MPRZ provisions.[60] Indeed we have some difficulty reconciling Mr Reaburn's concerns about the effects of permitted activities under the current rural zoning with his support for retaining the MPRZ on this land.

[150] Mr Reaburn accepted that visitor accommodation/tourist destination facility and clustered residential development were possibilities on some parts of the subject land, although he saw them as being at a rural or rural-residential density rather than an urban density.[61] This was repeated in his conclusion that there will likely be a future need to look at a targeted zoning for the land, as an improvement on the MPRZ, but that this would need to be more of a rural zone than an urban one.

[151] We think Mr Reaburn and Mr Jarvis exaggerate the degree of "urbanness" across all of the land that could follow on from a FDZ and a subsequent structure planning and plan change process. We are satisfied that a FDZ can adequately recognise the particular values of the land and provide for more appropriate management and development than is presently provided for under the MPRZ.

[152] On the basis of the information presented through this hearing we do not think it is appropriate to select specific urban zones for some parts of the subject land at this stage. The evidence indicates that the whole of the subject land would benefit from being included in a FDZ and made the subject of a more detailed structure planning exercise in the future.

[153] Mr Putt's amended FDZ illustrates how a set of provisions might be tailored to this land as a subzone and fit within the structure of the District Plan.[62] We recognise that Mr Putt prepared his provisions primarily for the Ellett lands but we consider that many of Mr Reaburn's criticisms are valid.[63] We agree that there needs to be a better recognition of the context of the subject land and the significant Maori, heritage,



[60] Reaburn EIC at [8.9]
[61] Reaburn, EIC, at [9.21]
[62] Putt, EIC, Appendix A
[63] Reaburn, Rebuttal, at [6.3] and [6.4]

coastal and amenity values. We do not consider it appropriate to signal that all of the subject land will be developed in the future for conventional urban activities or densities. However, neither do we consider it appropriate to signal that all of the subject land should be developed at a countryside living scale. As we have previously stated we consider that selective development will be required with some parts of the land likely to be able to be developed for urban activities and other parts managed as open space and lower intensity development. Whilst we understand the reason for the focus on traffic details included in Mr Putt's proposal, we consider that to be unnecessary and premature at this stage. It is more than sufficient to acknowledge that traffic and transport, along with other servicing matters, will be assessed, as usual, as part of a future structure planning process.

Overall finding on Zoning

[154] Accordingly, we find that all of the subject land would be more appropriately zoned FDZ; with the provisions being further amended to better recognise the significant values of the area; to provide guidance to the future structure planning process; and also to limit the interim use and management of the land. This will require amendments to the District Plan Chapter 16 – Future Development Areas.

[155] The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals, a change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

[a] A succinct description and explanation of the subzone and its context which:

[i] Identifies and provides for the significant characteristics of the area, including:

- Maori cultural associations with the area, including wahi tapu;
- Heritage and historic associations;
- The Otuataua Stonefields Historic Reserve;

- Landscape and amenity values;
- The Manukau Harbour and coastal environment; and
- The Auckland International Airport and business zoned lands.

[ii] Requires that a future structure planning process for the subzone:

- Further identifies and recognises these significant characteristics;
- Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and
- Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).

[b] The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

[c] Any consequential amendments to the District Plan.

[156] A FDZ in accordance with these directions will assist the Council to carry out its functions and is the most appropriate way to achieve the single purpose of the Act, as espoused in Part 2.

SHOULD THE NOR BE CONFIRMED?

Introduction and History

[157] On 18 October 2007, the then Manukau City Council issued a Notice of Requirement (**NOR**) for a designation for *Otuataua Stonefields Passive Public Open Space and Landscape Protection Purposes.* The NOR applies to the subject land to

the west of Oruarangi Road and to the north of Ihumātao Road, bordering the Otuataua Stonefields Historic Reserve.

[158] The objective is to *create public open space adjacent to the Otuataua Stonefields ... and to protect the landscape, the cultural heritage landscape, and the visual amenity of the Mangere Gateway Heritage Area.* It is clear from the requirement that its purpose is to extend the Stonefields Reserve so that it includes all of the lands from the coast to Oruarangi and Ihumātao Roads.

[159] The land which constitutes the Stonefields Reserve was acquired from the appellants in 1999.[64] It appears from the evidence,[65] that the Stonefields Reserve has its genesis from investigations and identification of the area for protection by the New Zealand Historic Places Trust (**NZHPT**) in the early 1980s. The Stonefields was listed as an historic place – Category 2, by the NZHPT in November 1991.

[160] It would appear that the Council relied on the work done by the NZHPT and the Department of Conservation as a basis for issuing the NOR for the existing Stonefields in June 1995. The boundary of the designation was similar to, but not the same as, the boundary shown on the NZHPT Plan. The issue of the NOR was accompanied by complementary provisions in the notified version of the 1995 Proposed Manukau City District Plan.

[161] Despite opposition, including from the appellant landowners, the designation was confirmed by Council on 20 May 1998. The Council then embarked on a process of negotiation with the appellants and settled the purchase of all the Stonefields land in late 1999.

[162] Variation 5 to the then Proposed District Plan was promulgated in late 2000. The Variation rezoned the Ellett and Mendelssohn land from Mangere-Puhinui Heritage Zone to Mangere-Puhinui Rural Zone, removed the waahi tapu identification from the Ellett and Mendelssohn land, and introduced site specific land use and subdivision rules for the Ellett and Mendelssohn land. This was part of a negotiated agreement which included that Council would:[66]

[a] Take all reasonable steps, by way of consent order, to zone the residue land Mangere-Puhinui Rural Zone;

[64] There was one other landowner – Rennie
[65] See Reaburn, Supplementary Evidence, Part 3
[66] Reaburn, Supplementary Evidence at [3.6]

[b] Take all reasonable steps, by way of consent order, to permit the creation of two lots from the residue land, including one lot of 1ha; and

[c] Consult with tangata whenua requesting their consent to either remove the waahi tapu notation from the residue land or to agree to the creation of two lots referred to above, including the construction of a single dwelling and garage on the 1ha lot.

[163] In accordance with the negotiated agreement, a kaumatua of the Makaurau Marae *conducted a ceremony to uplift the waahi tapu on the site ... namely Part Allotments 170 and 171 Parish of Manurewa.*[67]

[164] All of the landowners testified to the fact that, in their view, the negotiated agreement set a price well below market value, hence the agreed concessions by Council. More importantly, an assurance was given that no more land would be taken for reserve.

[165] However, by December 2006 the Council's attitude changed. As part of the process relating to Plan Change 14, the Council sought further landscape reviews. The *Peake Design Landscape Assessment*, dated March 2006, and the *Nick Robinson Landscape and Visual Assessment*, dated November 2006, were obtained. Both attributed high values to the NOR land. Two further reports were obtained, one by Buckland and McMillan in July 2007, and one by Absolum in March 2009.

[166] Buckland and McMillan state:

> ... while previous landscape assessments have focussed on individual heritage sites and landscape units, none have focussed on the heritage value of the open space as part of a wider context, a network of high quality open space which includes the Manukau Harbour.

[167] Mr Scott, in his evidence-in-chief, had three major criticisms of the landscape reports relied upon by the Council:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[68]

[67] *See* Council Report introducing Variation 5, Section 1.1, Exhibit G to Reaburn Supplementary Evidence

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[69] and

[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

[168] According to Mr Reaburn, the Council decided to initiate the NOR in November 2006. He said:[70]

> 4.3 Amendments to proposed Plan Change 14 and associated processes were considered (as confidential items) by the Council in November and December 2006. It is at that time that the Council decided to initiate the NOR. This decision was based on the landscape assessments referred to above, the November 2005 Louise Furey archaeological appraisal and a February 2006 Social and Cultural Impact Assessment Report prepared by Integrated Research Solutions Limited for the Makaurau Marae.

[169] Informal notice was given to the landowners by letter dated 30 November 2006 giving them until 11 December 2006 to communicate their views. The Urban Design Committee of the Council resolved to notify the NOR at a meeting in March 2007.

[170] It is against this contextual background that we now look at the contested issues.

Notice of Requirement

[171] Section 168A of the Act[71] relevantly provides as follows. The **bolded** portions are those which identify the contested issues:

> (1) When a territorial authority proposes to issue a notice of requirement for a designation –
>
> (a) **for a public work within its district and for which it has financial responsibility**; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work –

---

[68] Scott, EIC, at [19]
[69] Ibid, EIC, at [20]
[70] Reaburn, Supplementary Evidence, at [4.3]
[71] As it applied at the relevant time

It shall notify the requirement in accordance with s.93(2); and the provisions of s.168, with all necessary modifications, shall apply to such notice.

...

(3) When considering a requirement and any submissions received, a territorial authority must, **subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—**

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) **whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work** if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) **whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought**; and

(d) **any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.**

(4) The territorial authority may decide to—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

[172] Under Section 174(4) of the Act, the Court is to have regard to the matters set out in Section 171 which are the same matters set out in Section 168A(3), and the Court may cancel or confirm the requirement, and may modify it or impose conditions.

Is the designation a public work?

[173] Public work is defined in the RMA as:

... the same meaning as in the Public Works Act 1981, and includes any existing or proposed public reserve within the meaning of the Reserves Act 1977 and any National Park purposes under the National Parks Act:

[174] The RMA definition expressly includes existing or proposed public reserves under the Reserves Act 1977. The NOR document needs to be considered robustly and in the round. We are satisfied that it is clear from a reading of the NOR documentation in the round, that the work proposed by the Council is an extension of the Stonefields Reserve.[72]

[175] We thus consider that the NOR is for a public work.

Does the Council have financial responsibility?

[176] As a requiring authority, the Council may notify a requirement for the designation of a public work within its district for which it has financial responsibility (Section 168A(1)(a)). Counsel for Wallace submitted, that the Council has made no financial provision for acquiring the land and has not accepted financial responsibility now or in the reasonably foreseeable future for the work on the designated land.[73]

[177] There is no evidence before us that would suggest the Council has disclaimed financial responsibility for the works. The Council continues to actively pursue the designation. Ms Bowers confirmed that the Council has always accepted, and continues to accept, financial responsibility for the NOR.[74] Council Senior Acquisitions and Disposals Adviser, Mr Alan Walton, repeats this confirmation in his rebuttal evidence.[75]

[178] We agree with the submission of counsel for the Council, that the purpose of the reference to financial responsibility in Section 168A is to avoid situations where a requiring authority issues a NOR but seeks, in some way to disclaim any responsibility for it. As the Environment Court noted in ***Re Waitaki District Council***, citing earlier High Court authority:[76]

> [31] The reason why financial responsibility is important was explained in Waiotahi Contractors Limited v Owen [(1993) 2 NZRMA 425]. There the High Court was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council has refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:

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72 Bowers, EIC, at [5.1] and Reaburn, EIC, at [10.2] – [10.3]
73 Opening Submissions, at [50] and [51]
74 Bowers, EIC, at [4.13]
75 Walton, Rebuttal, at [3.2]
76 [2007] NZRMA 68, at [31]

> ... The provision in a District Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[179] The Town and Country Planning Appeal Board put the matter well in an early decision, ***Newspaper House Limited v Wellington City Council***[77]:

> **By designating land in its district scheme, on its own motion, for a proposed public work, the council thereby records that vis a vis the owners of the land, it accepts the financial responsibility for the acquisition of the land for the proposed work.** But this Board has no jurisdiction positively to order a council to execute a proposed work. The only positive power the Board has is in certain circumstances to order the council to acquire land ... but it does not follow that the designation of the land required for a work binds the Minister or public body to execution of the proposed work. Designation of land for a public work is a planning action. Construction of a public work is an executive action.
>
> *[emphasis ours]*

[180] The acceptance of financial responsibility is evident from the fact that it is the Council (and not some other entity) that has requested the designation, and the fact that, if approved, the Council will be the party that holds the designation. The Council has not disclaimed financial responsibility for the designation.

Are the works and designation reasonably necessary to achieve Council's objectives?

[181] Under Section 171(1) of the Act, we are required to determine whether both the public work and the designation are reasonably necessary for achieving the objectives of the Council for which the designation is sought.

What are the Council's objectives?

[182] It is clear from the NOR and the submission for the Council, that the public work (reserve land) is required to achieve the objective of protecting and preserving the public open space and landscape characteristics (which include the

[77] (1977) 1 NZTPA 289

cultural/historic heritage landscape characteristics) of the land and, importantly, the adjacent Stonefields Reserve.[78]

Is the public work reasonably necessary to achieve the objective?

[183] We consider that the reasonably necessary test is an objective, but qualified one. In ***Watkins v Transit New Zealand***[79] the Court noted:

> ... In short "necessary" falls between expedient or desirable on the one hand, and essential on the other, and the epithet "reasonably" qualifies it to allow some tolerance.

[184] We are also aware of the limits of any enquiry into the merits of the objectives. It is now well settled that the Act neither requires or allows the merits of the objectives themselves to be judged by the Court. For instance, in ***Babington***, the Planning Tribunal said:[80]

> ... It is not for us to pass judgment on the merits or otherwise of this objective. What we are required to do is to have particular regard to whether the proposed designation is reasonably necessary for achieving it.

[185] We have already considered some of the evidence base relevant to the historic landscape, and the threat to that landscape. Ms Bowers introduces the NOR in her evidence, describes its purpose,[81] and explains the contribution the land will make in practical terms if it is added to the OSHR. Mr Reaburn discusses the need for the NOR and whether it is necessary to achieve the objectives in his evidence-in-chief.[82] The evidence of Mr Murdoch (historic heritage), Dr Clough (archaeology) and Ms Absolum (landscape), provides direct support for the NOR.

As for the protection of the Stonefields Reserve

[186] We are well aware of the value of the Stonefields as an historic reserve. Its acquisition by the Council from the landowner appellants was preceded by some 20 years or so of research and reporting of its heritage values. These reports consistently referred to the Stonefields as a nearly complete Stonefields system of about 100 acres. The boundaries of the Stonefields were defined in 1984 when Historic Places Trust gave the land a Category 2 registration under the transitional provisions of the

[78] Dickey, Opening Submissions, at [4.19] and [4.83]
[79] A54/03, at [47]
[80] (1993) 2 NZRMA 480, at [486]
[81] Bowers, EIC, at [4.8] and onwards
[82] Reaburn, EIC, at [10.11] – [10.13] and [10.4] – [10.7]

Historic Places Trust Act 1993. The acquisition followed nearly the same boundaries as the Historic Places Trust schedule.

[187] The evidence established, and this was confirmed by our observation on our site visit, that the Stonefields are very well contained, as was pointed out by counsel for Wallace.[83] From the approach to the Stonefields there is already a buffer of sorts in the remnant volcanic cones at Otuataua and Pukeiti (former quarry sites), the former water and quarry reserves and the Wallace land acquired as part of the reserve.

[188] The NOR for the Stonefields identifies that the public works may include an interpretation centre, a carpark, public toilets, and a cultural/heritage centre. Suitable areas for all of these activities were identified within the reserve, areas which had lesser remnants of the Stonefields due to the past farming practices.

[189] We are satisfied that the Stonefields themselves, well contained as they are, can be adequately protected by sensitive development that recognises and provides for their value.

As for the subject land

[190] As for the subject land itself, we are conscious that, notwithstanding the availability of a Mangere-Puhinui Heritage zoning, which is applied to some land within the Mangere-Puhinui Heritage area, the subject land was given a less restrictive *rural zoning* – a zoning that does not protect the heritage and cultural aspects espoused by all the witnesses. This would tend to indicate that the heritage aspects of this land are ranked as less important.

[191] We are also conscious that the Council arranged for a kaumatua to carry out a ceremony over part of the land to lift any tapu. While such a ceremony is not determinative or binding on all Maori, it does reflect the worth of the land in cultural terms to the Council at that time.

[192] In our view, the Council witnesses have over-emphasised the need for a reserve to protect and preserve the special characteristics of this land. By focussing on the special cultural, historical and landscape characteristics of the land, they have closed their minds to the possibility of sensitive development of the properties. In other words, they have not adequately factored in sensitive development of the

[83] Opening Submissions, at [79]

properties. Development that would need to be carried out in compliance with the Historic Places Trust Act, may well require further archaeological survey work and the obtaining of a resource consent. A well thought out Structure Plan could recognise significant features and values and could address landscape buffers, setbacks, height controls, view shafts, and access to the coastal marine area and the Stonefields.

[193] The Council Commissioners in their decision relied heavily on the landscape, heritage and archaeological reports for their finding that the designation is reasonably necessary to achieve the Council's objective of protecting the cultural, heritage and landscape values of the land and the Stonefields Reserve. We have already averred to Mr Scott's three major criticisms of these reports, namely:

[a] Other potential land use scenarios were not adequately analysed in regard to the existing and proposed zoning of the area and land titles subject to the appeals;[84]

[b] They did not adequately consider the scale of the Airport development as a primary landscape determinant beyond the natural features and/or heritage matters;[85] and

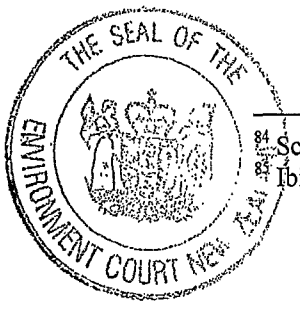
[c] The landscape qualities have been elevated beyond the status identified in the regional provisions.

Criticisms that we consider on the evidence to be valid for the reasons we have given in our discussion on the MUL line.

[194] For the above reasons, we conclude that the public work is not reasonably necessary to achieve the Council's objectives.

Has adequate consideration been given to alternatives?

[195] Where, as in this case, the requiring authority does not have a sufficient interest in the land, Section 171(1)(b) of the Act requires the Court to examine what consideration has been given by the Council to alternative sites or methods for



[84] Scott, EIC, at [19]
[85] Ibid, EIC, at [20]

achieving its objectives. In ***Bungalo Holdings Limited v North Shore City Council,*** the Environment Court observed:[86]

> [111] We understand that Section 171(1)(b) calls for a decision maker to have particular regard to whether the proponent has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily or giving only cursory consideration to alternatives. A proponent is not required to eliminate speculative or suppositious options.

[196] The test is whether *adequate consideration* has been given. As counsel for Wallace pointed out, the entire consideration given to alternatives in the NOR is:

> The council considers that this land is part of a cultural heritage landscape, with landscape values and a unique visual amenity. There are no other sites that meet these criteria.

No mention is made of *alternative methods* for achieving the objective, which do not involve designation and the prevention of any reasonable use of the land. He said, it is difficult to describe such an analysis as anything more than *cursory*.

[197] All counsel for the land hold appellants referred to the limited consideration by Mr Reaburn to alternatives. He devoted three paragraphs in his evidence-in-chief and one paragraph in rebuttal. In rebuttal, Mr Reaburn was dismissive of alternatives being practically achieved, but the point is, they were not considered at all, or at most in a very cursory way, prior to issuing the NOR.

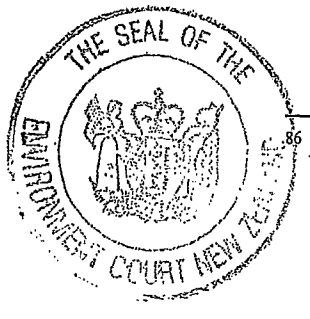
[198] The most obvious alternative methods include:

[a] To acquire the land by private treaty;

[b] To acquire the land under the Public Works Act; or

[c] To address the proper zoning of the land which could have been done as a prelude to Plan Change 14.

[199] Any one of these options could have preserved and protected the open space and landscape characteristics of the appellants' land without driving down the price of the land and disenabling the landowners from any benefit.



[86] A052/01, at [111]

[200] The lacuna left by the Council was addressed in part by the evidence of Mr Scott and Mr Putt. They advocated a *future development zone*. A matter that was peremptorily dismissed in the Council decision:[87]

> Counsel for Mr Ellett et al. suggested that there had been no real consideration of alternatives for achieving the Council's purposes and suggested that an appropriate zoning with particular controls could achieve the same result. However, the Commissioners do not consider Counsel is seriously suggesting that Council has been remiss in its choice of method to achieve its goals, noting that zoning itself provides no opportunities for the purchase of the properties. ...

[201] On the other hand, we have found that a *future development zone* would be in accordance with the purpose of the Act having regard to the relevant provisions of Part 2. This is a matter, that we have already discussed in some detail.

[202] We accordingly find that adequate consideration has not been given to alternative methods.

Overall finding on NOR

[203] For the above reasons, we cancel the requirement as it affects the subject land.

THE COUNCIL DECISIONS

[204] Under Section 290A of the Act, we are required to have regard to the decisions that are the subject of the appeals. As we have decided differently on the underlying general issue relevant to the appeals, we have, not surprisingly, come to a different conclusion.

[205] The fundament of the Council's decisions were that protection from all development was the most appropriate way:

[a] to protect the Stonefields;

[b] to protect Maori associations with the land; and

[c] to protect heritage values.

[87] Notice of Requirement Decision, Section 12, page 15

[206] We have already averred to parts of the Council's decisions in earlier sections of this decision. In the decision of the Commissioners on the NOR dated 27 March 2009, they said:[88]

> Section 6(f) The protection of historic heritage from inappropriate use and development: The NoR will ensure the protection of the Stonefields and provide a buffer from adjoining Airport and other development.

And:

> The Commissioners have carefully carried out this evaluation and accept that Maori have a relationship with the NoR land; that that relationship is no more or less important than the relationship with all of the land in the Mangere-Puhinui area, carrying as it does a rich historical narrative as described in Mr Murdoch's evidence. Given its location adjoining the Stonefields, a recognised wahi tapu, care must be taken to ensure that activities which could be 'intrinsically offensive' are avoided.
>
> The Commissioners find that maintaining this land in a rural zoning will not necessarily maintain the section 6(e) relationship; and that the only way to achieve this is through the passive public open space designation.

[207] The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development. They are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.

[208] We have had the benefit of lengthy, and at times, detailed cross-examination on the major underlying issue. At all times we have been conscious of the Council's decisions. However, after careful consideration of the evidence before us, we have, for the reasons given in this decision come to a different conclusion.

[88] At page 30

DETERMINATION

[209] We make the following determination:

A. The MUL is to be extended to include the land subject to appeal;

B. The land subject to appeal is to be zoned Future Development Zone;

C. The NOR is cancelled as it affects the land subject to appeal

D. The Council is directed, under Section 293, to prepare, in consultation with all other parties to these appeals:

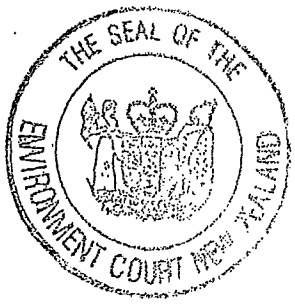
1. A change to the Auckland Regional Policy Statement to amend the location of the MUL in accordance with A above; and

2. A change to the Auckland Council District Plan (Manukau Operative Section) to provide for the subject land as Future Development Zone within Chapter 16 – Future Development Areas. The subject land is to be identified as a FDZ subzone and we suggest it could be described as "Ihumātao Peninsula". The amendments to the District Plan are to provide for:

a. A succinct description and explanation of the subzone and its context which:

i. Identifies and provides for the significant characteristics of the area, including:

- **Maori cultural associations with the area, including wahi tapu;**
- **Heritage and historic associations;**
- **The Otuataua Stonefields Historic Reserve;**
- **Landscape and amenity values;**
- **The Manukau Harbour and coastal environment; and**



- **The Auckland International Airport and business zoned lands.**

ii. Requires that a future structure planning process for the subzone:

- **Further identifies and recognises these significant characteristics;**
- **Determines the location and density of urban development selectively; with urban activities concentrated in nodes and areas of open space and lower intensity development; and**
- **Provides for efficient and effective servicing and an Integrated Transport Assessment (ITA).**

b. The FDZ Rules (16.10 to 16.14) to be amended as necessary to restrict the activities that might compromise the features and values of significance in the area, including limiting earthworks, land cultivation and large buildings (including greenhouses).

c. Any consequential amendments to the District Plan.

E. The Council is to submit the changes directed under D. to the Court for confirmation by 28 September 2012.

F. Costs are reserved, but in our tentative view should lie where they fall.

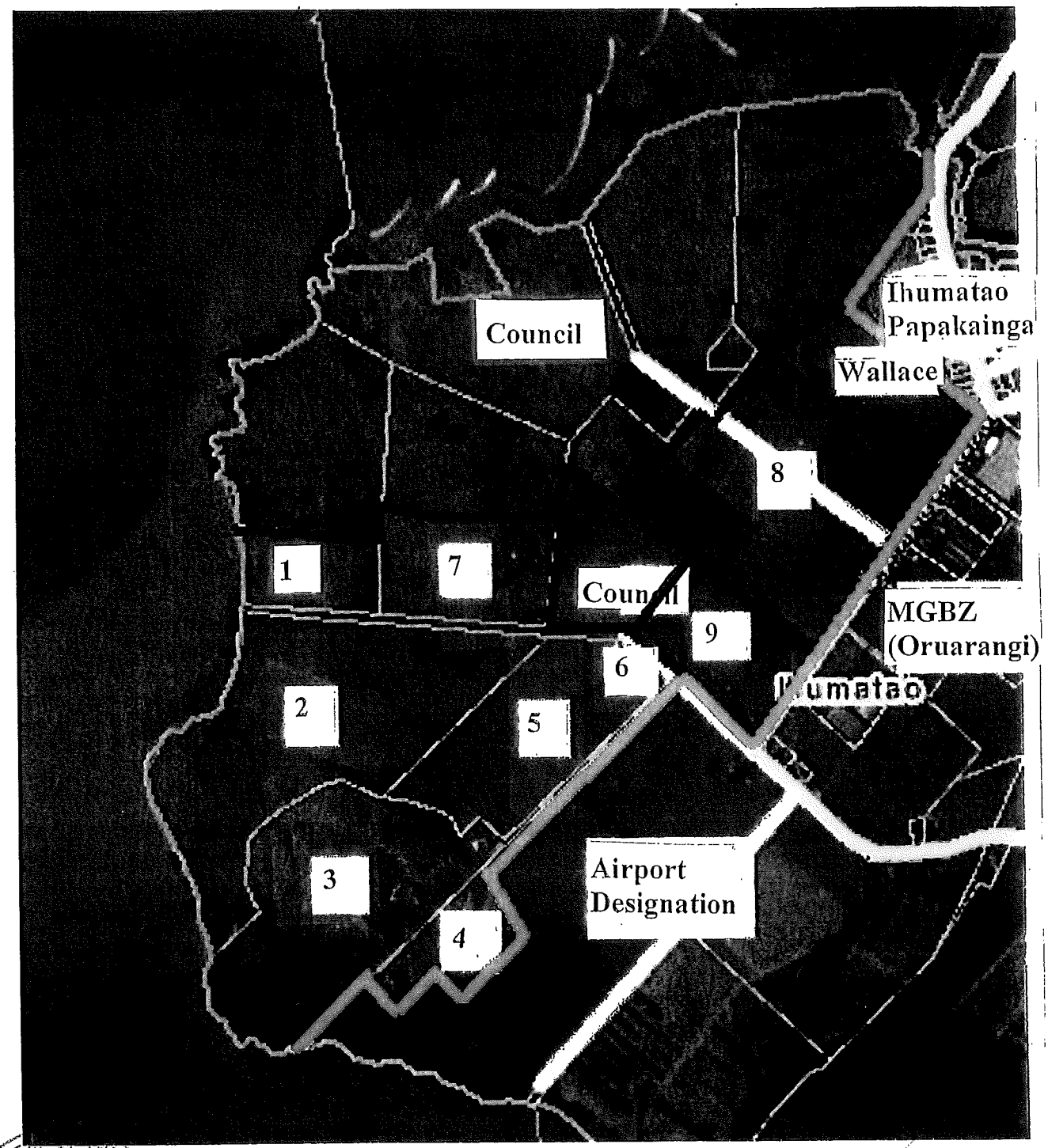
SIGNED at AUCKLAND this 15th day of June 2012

For the Court:

R G Whiting
Environment Judge.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

APPENDIX 1 – The subject land



APPENDIX 2
SUMMARY OF EVIDENCE RELATING TO MAORI ISSUES

Ko Maungataketake te maunga
Ko Rakataura te tangata
Ko Te Kawerau a Maki me Te Waiohua nga iwi
Ngati Te Ahiwaru me Te Akitai oku hapu
Ko Makaurau te Marae (Warena Taua, Mihi eic)

Maungataketake is the mountain
Rakataura is the person
Te Kawerau a Maki and Te Waiohua are the tribes
Ngati Te Ahiwaru and Te Akitai are my sub-tribes
Makaurau is the Marae

[1] Over 8 centuries several iwi and hapu have occupied the Ihumātao area and the wider Auckland Isthmus.

[2] These iwi and hapu include Ngati Rori (later called Te Ahiwaru), Te Kawerau a Maki, Ngati Te Ata, Ngai Tai, Ngati Poutukeka (abbreviated to Ngati Pou then later changed to Te Wai o Hua), Te Akitai, Ngati Paretaua, Ngati Tamaoho, Ngati Huatau, Te Aua, Ngati Tahuhu, Ngati Kaiaua plus others.

[3] There is little doubt that Ngati Ahiwaru, the inhabitants of this area in 1853, were unfairly treated by the Crown but such matters cannot be addressed through this RMA process.[1]

[4] On Wednesday 7 December we sat at the Makaurau Marae. We heard evidence on Maori issues from Mr Hori Winikerei Taua, Mr Hare Paewhiro Huia Tone, Ms Dawn Maria Matata, Mr Rapata Roberts, and Mr Te Warena Taua.

[5] **Te Warena Taua** of Te Kawerau a Maki, Ngati Te Ahiwaru, and Te Akitai of Waikato, and Chairman of Te Kawerau a Maki Tribal Authority gave evidence on their whakapapa, history and tradition which he had learnt from his grandfather and Waikato elders.

[1] Murdoch, EIC, at [6.7]

[6] Having been brought up in te ao Maori by his parents and elders, he trained as an ethnologist and has published history of the Auckland tribes, and Maori history of the Howick, Pakuranga and surrounding area.[2]

[7] His evidence is that Makaurau and Kawerau reached settlement with the landowners and Auckland International Airport Ltd regarding the rezoning of the Metropolitan Urban Limits but consider that protecting the remaining land is of critical importance to them. This land is directly adjacent to the Stonefields reserve, and contains significant wahi tapu. He states, "*Both Kawerau and Makaurau have unbroken ancestral relationships with this land and assert mana whenua over this area*" and because Maungataketake has been desecrated through quarrying they prefer minimal invasive future development on this land.[3]

[8] Mr Taua gave evidence on the historic occupation of their people in this Ihumatao area since the arrival of the Tainui waka up to present day. We received a confidential map setting out waahi tapu sites and sites of special significance within the subject land and adjacent land. This included burial sites of ancestors, sacred caves and tunnels, and other matters of importance to Kawerau and Makaurau. The numerous, and great significance of the, wahi tapu has lead them to regard the whole area as wahi tapu.[4]

[9] He was cross-examined at length regarding the wahi tapu by counsel for the appellants.

[10] When questioned by Mr Cavanagh as to whether food and tapu were able to mix, Mr Taua replied:

> ... Te Rau-anga-anga, King Potatau's father, now he was a General in the wars, and while they were eating at Kaitotehe, the old pā of theirs, they were eating food and kumara. They summoned the heads and hence, his name Te Rau-anga-anga, of 100 heads. They asked for the heads to come, be put in front of them while they ate. They have that right, they are the chiefs. They can determine whatever they wish. They can make tapu, they can break tapu. The right is solely theirs.[5]

[11] Mr Littlejohn queried the validity of the tapu lifting ceremony performed by Mr Wilson on the Mendelssohn property in 1999 given Mr Taua's earlier comments that tangata whenua were able to "*make tapu or break the tapu*". Mr Taua replied:

> ... Please understand that when he went there, it was to placate the owners of the land, because they feared somewhat that a tapu had been put over by the Māoris who were

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[2] Taua, EIC, at [6] – [7]
[3] Ibid, EIC, at [12]
[4] Ibid, EIC, at [14] – [19]
[5] Taua, Transcripts at page 450

> involved with the Stonefields. His karakia was simply to make the family feel happy, by offering a karakia... [6]

[12] Mr Enright argued that there were two separate entities represented at this hearing and that "*any waiver of wahi tapu by the Makaurau Marae kaumatua does not bind Kawerau*".[7]

[13] Mr Casey in his closing submitted that no wahi tapu or sites of significance have been identified on the current Wallace land other than part of the slopes of Puketapapa.[8]

[14] While he accepted Mr Taua's "*broad understanding of the meaning of tapu*", he submitted that this "*expansive understanding does not fit with the meaning ascribed in Section 6(e)*", citing ***Serenella Holdings Ltd v Rodney District Council***:[9]

> It is important however to record that the matters of national importance in s 6(e) that are to be recognised and provided for , should not generally include everyday activities and wide-spread but long lost random burials, with the consequence of preventing new endeavour on the land. The consequences for continuing human endeavour are obvious, it would become difficult or even impossible to obtain consents to carry out activities on land that has passed out of Maori ownership to non-Crown interests, if the principles in s 6(e) are to be considered to operate in some sort of blanket fashion based on daily general association with the land of Maori life in times past. Section 6(e) calls for proof of something more in order to attain recognition and provision as a matter of national importance.

[15] The ancestral relationship and cultural relevance of an area is often reflected in the named localities.[10] We note some of these names in the following examples: [11]

[a] Mataoho - Te Kawerau a Maki and the people of Ihumātao regard this area as part of the creation of the atua Mataoho, as portrayed in many of the landmarks of the Auckland Isthmus;

[b] Te Ihu a Mataoho (Mataoho's nose, later abbreviated to Ihumatao, then Maungataketake, then Elletts Quarry);

[c] Te Pane a Mataoho (The Head of Mataoho or Mangere mountain);

[6] Ibid, Transcripts, at page 464
[7] Points of Reply by Counsel for Makaurau Marae Maori Trust Board Inc & Te Kawerau a Iwi Tribal Authority Inc, at [1]
[8] Casey, Closing Submissions, at [38]
[9] Ibid, Closing Submissions, at [39]
[10] Murdoch, EIC, at [4.59]
[11] Taua, EIC, at [22]

[d] Kouora and Pukaki Craters are Nga Tapuwae a Mataoho (The footprints of Mataoho); and

[e] Te Kapua Kai a Mataoho (Mataoho's Food Bowl or Mt Eden Crater).

[16] Other examples include:[12]

[a] Te Tahuhu o Tainui, now called Otahuhu (alluding to the Tainui waka being carried upside down from Tamaki River to Manukau Harbour);

[b] Te Manukanuka a Hoturoa, now Manukau Harbour (where Hoturoa, the captain of the Tainui waka became anxious due to the treacherous conditions);

[c] Nga Hau Mangere, now Mangere (the lazy winds, named by Rakataura, the Tainui waka tohunga);

[d] Te Motu a Hiaroa, (Hiaroa's Island) named after Rakatarua's sister Hiaroa, now called Puketutu Island.

[17] Mr Murdoch expanded on Puketutu as follows: [13]

> What we now know as Puketutu Island is really known as Te Motu a Hiaroa, the island of Hiaroa, who was a woman on the Tainui canoe, and that's the proper name for the island. The highest point of the island was one of, I think, three or four cones and it had a very sharp pointed peak on it, and that was called Puketutu. And so Puketutu is a landmark on Te Motu a Hiaroa, and as we so often do, we shift and cut and paste Māori names and in the same way Puketapapa has become Ihumatoa [Ihumatao] and so on.

[18] The wahi tapu within the area include sacred mountains, battle sites, burial sites, Pa sites and subterranean caverns that contained taonga.[14]

> Whilst wahi tapu such as Maungataketake have been desecrated and physically destroyed, we hold fast to the tikanga that tapu associated with those sites remains intact.[15]

[19] Of significance to Te Kawerau a Maki and Makaurau is that one of the hui to select the first Maori king was held at Ihumātao and Potatau Te Wherowhero lived there prior to his accepting the mantle as king.[16]

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[12] Ibid, EIC, at [26]
[13] Murdoch, Transcripts, at page 269
[14] Taua, EIC, at [31]
[15] Ibid, EIC, at [32]
[16] Ibid, EIC, at [37] – [38], Murdoch, EIC, at [5.2.2]

[20] Mr Taua cited a number of development ventures in this area that have been detrimental to their iwi. These included:[17]

[a] the Auckland Airport;

[b] the Mangere Sewerage Treatment Facility;

[c] the destruction of Maungataketake for a quarry.

[21] The common elements of these examples are:[18]

[a] Imposition of decisions that directly impact on tangata whenua;

[b] Prioritisation of regional amenity over the values of tangata whenua;

[c] Destruction of significant landmarks;

[d] Environmental degradation, which in turn effects water quality and the availability of natural resources such as kai moana, which are fundamental to our way of life;

[e] Desecration of wahi tapu and other sites of spiritual, cultural and heritage significance;

[f] Marginalisation of tangata whenua from ownership and development opportunities; and

[g] Encroachment of development on the oldest papakainga in the Auckland region, which impacts the character of the area and the quality of lifestyle of tangata whenua.

[22] In summary, Mr Taua concluded that Te Kawerau Iwi Tribal Authority and Makaurau Marae Trust as representatives of the ahi ka:

[a] oppose urbanisation of the Ellett, Wallace and Mendelssohn lands;[19]

[b] support the acquisition of those lands as public open space;[20]

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[17] Taua, EIC, at [40]
[18] Ibid, EIC, at [41]
[19] Ibid, EIC, at [44]

[c] emphasise the significance of the area because of

[i] the number of wahi tapu;[21] and

[ii] wrongful confiscation by the Crown.

[23] **Mr Graeme Murdoch** a noted scholar and historian provided a detailed summary of the pre and post European human and cultural history of the Mangere-Puhinui, Ihumātao block and the wider Auckland region on behalf of the Auckland Council.

[24] He had the added advantage of being proficient in the Maori language and having learnt from a life long association with the elders of Ngati Ahiwaru, Te Akitai, Te Kawerau a Maki and other iwi in the greater Auckland Isthmus.

[25] Mr Murdoch opines that sacred knowledge acquired through discussion with kaumatua has "*equal validity*" and often "*greater importance*" in Section 6(e) RMA matters than academic and archaeological sources.[22]

[26] In his youth he was aware that the volcanic features of the Ihumātao were recognised as taonga by local Maori[23] and that the subsequent modification and destruction of these features have caused "*immense distress*" and "*ongoing grief*" to the tangata whenua.[24]

[27] Examples of these modifications include the creation of the sewerage ponds and the water treatment plant, the quarrying of various maunga (Maungataketake and Puketutu) and building the second runway for the Auckland International Airport.

[28] Another cultural icon, Te Kahui Tipua "*assemblage of spiritual guardians*" Haumia, Papaka and Kaiwhare were destroyed when the Mangere Wastewater Treatment Plant sewerage ponds were built.[25]

[29] Similarly Te Punga o Tainui – "*the anchor stone of Tainui*" situated just off the Oruarangi Creek was "*tragically*" destroyed during the construction of the Mangere Wastewater Treatment Plant sewerage ponds.[26]

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[20] Ibid, EIC, at [44]
[21] Taua, EIC, at [46]
[22] Murdoch, EIC, at [4.1.1]
[23] Ibid, EIC, at [4.2.3]
[24] Ibid, EIC, at [4.2.4]
[25] Ibid, EIC, at [4.2.5]
[26] Ibid, EIC, at [4.2.7]

[30] When Tainui waka left Ihumātao and ventured on to Kawhia, two "*illustrious founding ancestors*", Rakataura their leading tohunga, and a younger rangatira named Poutukeka, remained. Their direct descendants are the people of Ihumātao connected with the Pukaki and Makaurau Marae.[27]

[31] Poutukeka was the eldest son of Hoturoa the captain of the Tainui waka.[28] His descendants, Ngati Poutukeka, lived in this wider Mangere-Puhinui area.[29]

[32] Rakataura later became known as Hape. Puketapapa or Te Puketapapatanga a Hape (the hilltop resting place of Hape) "*imbues the wider Ihumatao Penninsula with particular mana, spiritual unity and significance*".[30]

[33] In spite of the Crown confiscation of the 1100 acre Ihumātao block in 1865 the hapu associated with Makaurau Marae have maintained an unbroken "*ahi ka roa*" in this area for over 6 centuries.[31]

[34] Mr Murdoch also narrated the tribal interactions and occupations arising from the musket wars,[32] and the alienation of lands in the Tamaki-Manukau area.[33]

[35] He gave evidence on the Te Waiohua practice of shifting agriculture in a seasonal cycle of gardening and resource gathering and how they left aside the defensive areas of the cone pa, the settlements and the sacred burial areas.[34]

[36] He cautioned against relying solely on archaeological site records for identifying heritage areas citing the discovery of the largest burial found in the district during earthworks for the Airport second runway as an example.[35]

> Archaeological sites and their qualities and values of course provide only one component of the historic and cultural heritage values of the Ihumatao cultural landscape of significance to Tangata Whenua.[36]

[37] Mr Murdoch emphasises the importance of Maori identity through ancestral relationships to cultural landscapes regardless of whether or not the land is in Maori ownership.[37]

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[27] Ibid, EIC, at [4.2.8]
[28] Taua, Transcripts, page 469
[29] Murdoch, EIC, at [4.3.2]
[30] Ibid, EIC, at [4.2.9]
[31] Ibid, EIC, at [4.3.1]
[32] Ibid, EIC, at [4.3.6] – [4.3.8]
[33] Ibid, EIC, at [4.4.1] – [4.4.7]
[34] Ibid, EIC, at [4.5.5]
[35] Ibid, EIC, at [4.5.8], Taua, EIC, at [42]
[36] Murdoch, EIC, at [4.5.9]

[38] In Section 5, EIC, he detailed the post European occupation of the Ihumātao area including their interactions with local iwi.

[39] With reference to Section 6(f) matters he states:

> ... the archaeological, architectural, cultural, historic, technological, and to some degree scientific qualities associated with the natural and physical resources of Ihumatao, relate to both the Maori and European occupation and use of the land. The Maori ancestral relationship that is held with the land, waters and other taonga associated with Ihumatao, forms a significant and integral component of these values. It is inextricably linked to all of these natural and physical resources, and not just to their "cultural and historical qualities".[38]

[40] He opines that the post-European component of the cultural heritage landscape of Ihumātao illustrates the early adaptation of Maori to the colonial economy and social change, adding that the Maori mission station is the finest remaining example of a nineteenth [century] complex left in the Auckland region.[39]

[41] He summarised that the cultural heritage landscape of Ihumātao is a significant example of "*a coherent and legible landscape that covers the entire continuum of human history and settlement in the region*" and that:[40]

> The Maori ancestral relationship with Ihumatao extends well beyond the nationally significant archaeological assemblage and landscape associated with the OSHR, to all parts of the Ihumatao peninsula and its natural and physical resources, including those areas modified by quarrying.

[42] He closes with the observation that the area is rich in human historical and cultural associations that have developed over nearly eight centuries that reflects the full range of Maori and post European heritage[41] and a quote from the Heritage Chapter of the District Plan:[42]

> Titiro ki nga wa o mua
> Ki te whakamarama I tenei ao
> Rapua te mea ngaro
> Hei maramatanga mo nga Ao e eke mai
>
> Look to the past to understand the present and seek answers for the future

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[37] Ibid, EIC, at [4.5.10]
[38] Ibid, EIC, at [6.3]
[39] Ibid, EIC, at [6.10]
[40] Ibid, EIC, at [6.14]
[41] Ibid, EIC, at [7.5.9]
[42] Ibid, EIC, at [7.5.10]

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2012-425-000576
CIV 2012-425-000566
CIV 2013-425-000242
[2013] NZHC 2347

BETWEEN	QUEENSTOWN AIRPORT CORPORATION LIMITED Appellant (in respect of CIV 2012-425-000566)
	REMARKABLES PARK LIMITED Appellant (in respect of CIV 2012-425-000566 and CIV 2013-425-000242)
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
	AIR NEW ZEALAND LIMITED Interested Party

Hearing:	19-22 August 2013 (At Queenstown)
Counsel:	R J Somerville QC and R A Davidson for Remarkables Park D A Kirkpatrick and R M Wolt for Queenstown Airport Corporation JDK Gardner-Hopkins and E L Matheson for Air New Zealand Limited
Judgment:	12 September 2103

JUDGMENT OF WHATA J

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Introduction

[1] Queenstown Airport Corporation ("QAC") wants to:

> ... provide for the expansion of Queenstown airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[2] It has issued a notice of requirement ("NOR") seeking in effect an additional 19 or so hectares of land in order to achieve this objective. Remarkables Park Limited (RPL) owns property that is subject to the NOR. With this land QAC could enable, among other works, a precision instrument approach runway and a parallel taxiway. It also would be able to provide additional space for other aviation activity, including for relocation of smaller and private aviation operations and helicopters.

[3] The NOR was considered by the Environment Court.[1] The Court rejected that part of the NOR seeking to provide for a precision instrument approach runway and a parallel taxiway. As a result, the area of land subject to the NOR was reduced to 8.07 ha.

[4] Both QAC and RPL contend that the Environment Court got it wrong. QAC identifies five errors of law while RPL identifies 12 errors of law. RPL is supported in large part by Air New Zealand Limited ("ANZL").

[5] QAC says, in short, that the Environment Court exceeded its jurisdiction by revisiting the scope of the existing designation and erred in law also by imposing a limitation on the NOR based on an interpretation of civil aviation standards that might prove to be erroneous.

[6] The RPL appeal raises the following key issues:[2]

(a) Whether the Environment Court was empowered to cancel part only of the NOR;

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1 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206.

2 There are other discrete issues dealing with s 16, cost benefit analysis, QAC's inconsistent approach and a substation.

(b) Whether the Environment Court erred by not adopting a threshold test of "essential" for the proposed works and designation;

(c) Whether the Environment Court wrongly failed to consider the unfairness of the NOR to RPL; and

(d) Whether the Environment Court wrongly treated an alternative site for the works located on existing QAC land as suppositious.

Structure of the decision

[7] I propose to address the appeal in four parts, namely:

(a) Part A – The background, jurisdictional, and statutory frame;

(b) Part B – The appeal by QAC;

(c) Part C – The appeal by RPL;

(d) Part D – Outcome.

Part A

Background

[8] The background to these proceedings is usefully summarised by the Environment Court which I largely adopt.

The parties

[9] QAC manages one of the busiest airports in New Zealand. There are on average 40,000 aircraft movements and over one million scheduled and non-scheduled passenger movements through the airport every year. The airport is owned by Queenstown Lakes District Council and managed by QAC. ANZL is a major user of the airport and is the largest scheduled service provider to and from the airport. RPL owns all of the undeveloped land within an area subject to the

Remarkables Park zone. A significant parcel of RPL land is affected by the NOR issued by QAC and then confirmed by the Environment Court.

The airport and existing designations

[10] The airport, the area subject to existing designations and the proposed designation, together with the surrounding land uses is helpfully depicted on a plan produced by RPL (by consent) and attached to this judgment as Annexure A.

Proposed designation

[11] The NOR was applied for on 21 December 2010 with the objective:

> To provide for the expansion of Queenstown Airport to meet projected growth while achieving the maximum operational efficiency as far as possible.

[12] Its key elements are:

- a helicopter facility;
- a general aviation (fixed wing) facility for up to Code B aircraft;
- a private and corporate jet facility for up to Code C aircraft;
- a fixed based operator (to service jets and possibly general aviation);
- a Code D parallel taxiway adjacent to main runway;
- a Code B parallel taxiway adjacent to cross-wind runway;
- a precision approach runway with a 300 metre width runway strip;
- ancillary activities, including landscaping, car parking, and an internal road network which includes two access roads to connect with Hawthorne Drive at the western end of the designation area and the Eastern Access road (EAR) at the eastern end.

[13] Significantly, for the purpose of these proceedings, the area included in the requirement for the designation includes Part Lot 6 DP 304345 and a portion of an unformed road adjacent to the south western corner of Lot 6 DP 304345, being land owned by RPL. The airport's southern boundary and the extent of the existing aerodrome designation adjacent to Lot 6 is located 201 metres south of the main runway centre line. The requirement is for a strip of Lot 6 approximately 160 metres

in depth, lying parallel to the entire one kilometre length of the common boundary of the QAC and RPL land.[3]

The interim decision

[14] Relevant to this proceeding the Environment Court made the following key orders in its interim decision:

> A That part of the NOR required for instrument precision approach runway and Code D parallel taxiway is cancelled. The court reserves its decision on the balance of the NOR.
>
> B By 5 October 2012 QAC is to file and serve:
>
> (1) an amended Figure 1 to the NOR reducing the extent of the requirement to exclude provision for a (sic) instrument precision runway and Code D parallel taxiway and any land no longer required for carparking, circulation and landscaping.
>
> ...

[15] The judgment is then framed by reference to key legal and evaluative issues. I detail here the findings that are relevant to this appeal. I note for completeness that the final decision is not subject to appeal and it is not necessary for me to address it here.

"Requirement"

[16] The Environment Court rejected RPL's submission that the term "requirement" in s 168 Resource Management Act 1991 should be construed in light of s 40 of the Public Works Act 1981. The Court found that the matter and subject of these provisions are not, as submitted, *in pari materia*. The Court observed:

> [46] ... In this case neither the relevant term nor subject matter addressed in section 168 RMA and section 40 PWA are the same and we do not accept RPL's submission that "a requirement" has the same meaning as "required" for the reasons we gave in [45] above.

[17] At [45] the Environment Court observed that the term "requirement" is a noun that is a term given to a proposal for a designation.

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[3] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [37].

Scope of evaluation under s 171(1)(b)

[18] The Court observed that the central issue under s 171(1)(b), dealing with the assessment of alternatives, is whether QAC gave adequate consideration to alternative sites, routes or methods. The Court then adopted the principles stated in the final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project as follows:[4]

> a) the focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration.
>
> b) the question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods.
>
> c) that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant.
>
> d) the Act does not entrust to the decision-maker the policy function of deciding the most suitable site; the executive responsibility for selecting the site remains with the requiring authority.
>
> e) the Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.

Scope of evaluation under s 171(1)(c)

[19] The Court also adopted the summary provided by the Board of Inquiry dealing with the Upper North Island Grid Upgrade Project for the purposes of its assessment under s 171(1)(c) dealing with whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority. Of particular relevance to this appeal, the Court adopted the following passage:[5]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

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4 *Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project* Ministry for the Environment, Board of Inquiry, 4 September 2009 at [117] and [186].

5 At [51].

[20] The Court added that it may consider the extent to which the work is reasonably necessary for achieving the requiring authority's objectives and may limit the extent of the designation accordingly.[6]

Section 171(1)(d) and the Public Works Act

[21] The Court agreed with submissions by QAC and QLDC that the compulsory acquisition process not having commenced s 24 PWA is not directly relevant to its determination. The Court noted:

> In particular, the three overlapping criteria in section 24(7) of fairness, soundness and the [reasonable] necessity for achieving the objective of the local authority (here QAC) are not matters we need to decide.

[22] The Court then goes on to observe:

> Even if we are wrong, and the issue of fairness (in particular) is relevant under section 171(1)(d), there is no evidence upon which we could find that QAC agreed, as submitted by RPL counsel, not to designate the land. Apart from the fact that QAC and RPL entered into contractual arrangements we have no evidence from RPL as to its reliance on the contracts or any representation made by QAC when subsequently planning to develop its land or that it held a legitimate expectation its "buffer" ie Activity Area 8, would not be reduced. (The contracts were handed up to the court as a bundle attached to counsel for RPL's opening submissions, which we were told "not to read".)

Best practicable option – s 16 of the Resource Management Act

[23] The Court held that s 16 is not to be applied as if it were an additional criterion to subs (1)(a)-(d) of s 171. The Court said in some cases adopting the best practicable option may be a useful check for the decision maker, particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

Statutory plans

[24] The Court then reviewed the various statutory planning documents applicable to the region, including the Regional Policy Statement (RPS) and the Queenstown Lakes District Plan, including the structure plan dealing with Activity Area 8, where RPL's land (Lot 6) is located. Reference is made to the fact that this activity area is a

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[6] Citing *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland AO52/01, 7 June 2001.

"buffer" area and the Court observes that while "buffer" is not explained in the District Plan, there was general agreement that these policies mutually benefited the RPL and QAC.

Section 171 evaluation

[25] The Court observes that QAC has commissioned no less than eight reports since 2003 dealing with its existing land and site facilities at the airport. It observes:

> [76] The reports produced in 2005, 2006, 2007 and 2008 consider sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. In four of the eight reports produced, consideration was given to relocating the general aviation/helicopter precinct south of the main runway. However, in each case the site of the proposed southern precinct is different from that supported by QAC in its NOR, albeit part of Lot 6 is included.

[26] The Court then deals with various master planning documents between 2005 and 2010. It notes that the 2005 Master Plan considered alternative locations within Lot 6 but they were dismissed because:[7]

> (a) these options required protracted negotiations and change of designations without guarantee of outcome;
>
> (b) there were no significant operational benefits; and finally
>
> (c) the options were highly distracting to QAC management.

[27] The Court then refers to an April 2007 South East Zone Planning Report observing that it is the only report to consider possible use of the designated land south of the main runway. The assumed planning parameters the Court said include a Code C aircraft design and a non-precision approach to the main runway. The Court observes that the report concluded:

> the northern side was a better location for future helicopter facilities

And the report also recommended:

> ... that general aviation flightseeing operations be grouped north of the main runway.

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7 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [79].

[28] The Court then refers to the 2010 Master Plan which listed five developments that it said has a significant bearing on the NOR provision for a general or aviation/helicopter precinct on part of Lot 6. The Court noted that these are:[8]

(a) the protection of airfield runway/taxiway/object separation distances for a precision approach runway;

(b) planning for a parallel taxiway;

(c) consideration of protection for aircraft with wider wingspans;

(d) accelerated traffic growth; and

(e) the decision to consider Lot 6 as an option for the general aviation/helicopter precinct.

[29] The Court considered that (a) through (c) above were critical in determining the spatial requirements of the designation. The Court observes that the 2010 Master Report evaluated two alternative locations for a general aviation/helicopter precinct:

(a) To the north east comprising 22 ha of land owned by QAC; and

(b) 19.1 ha to the south east located on part of Lot 6. The Master Plan concluded that the north east precinct is distinctly inferior.

Adequate consideration of alternative sites?

[30] The Court describes the five alternative sites as follows:[9]

(a) locating the general aviation/helicopter precinct on land north of the main runway including on undesignated land owned by QAC and/or QLDC;

(b) locating the general aviation/helicopter precinct on land north of the main runway within the aerodrome designation;

(c) whether RPL land should have a building restriction strip placed on it for a distance of 15.5m from the common boundary to satisfy taxiway separation distance requirements for a new southern taxiway or whether CAA dispensation could be obtained for this;

(d) the relocation of some or all of the general aviation and helicopter facilities off the Airport;

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8 At [82].
9 At [87].

(e) consideration of individual components of the work being accommodated within the existing aerodrome designation.

[31] The Court then found:

> We consider (a), (c) and (e) to be entirely suppositious for reasons that we set out next. However this is not true for (b) and (d) which we consider in more detail.

[32] Most relevant to this appeal, the Court treated option (a) as suppositious for the following reasons:

> [89] The Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the applications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[33] Before addressing the other mooted alternatives the Court makes the following initial findings of fact:

(a) there is insufficient land within the aerodrome designation to develop an instrument precision approach runway and southern parallel taxiway for Code D aircraft and to develop a general aviation/helicopter precinct; and

(b) QAC has no firm development plans for designated land north of the main runway.

[34] Dealing then relevantly with the alternative precinct on land north of the main runway within the area of the aerodrome designation the Court observed:[10]

> ... Several issues present themselves against a northern precinct, including the transportation of dust into helicopter hangars carried by the prevailing westerly winds and the stronger lower frequency southern winds, increased

[10] At [103].

> exposure to the winds from the south and west during helicopter take off and landings, increased runway occupancy by helicopters to minimise or reduce exposure to prevailing winds; the geographical constraints north of the cross wind runway and the desirability for flight paths over TALOs to be unobstructed by stacked (parked) helicopters. All these are important factors which lead to the adoption by QAC of a southern precinct.

[35] After considering the remaining alternatives, the Court then makes an overall conclusion, stating a summary of reasons as to why it considered that other alternatives had been given adequate consideration. The Court observed:

> [112] We conclude that there is an array of factors, including safety, which militate against a northern location for a helicopter facility. Of these cost (to the helicopter operator and other users of the Airport) is an important consideration, but it is not determinative. Section 171(1)(b) is satisfied as we find that adequate consideration was given to alternative location of the helicopter facility.
>
> [113] Likewise we are also satisfied that adequate consideration was given by QAC to alternative locations for corporate jets and that it is operationally efficient to locate these adjacent to the proposed Code C taxiway south of the main runway.
>
> [114] Apart from the April 2007 study, none of the studies looked at the option of splitting the various aeronautical businesses north or south of the main runway within the existing aerodrome designation. But in the absence of any contrary evidence we conclude, like corporate jets, it is operationally efficient to locate fixed wing operators adjacent to a proposed Code C taxiway.
>
> [115] We are also satisfied that under section 171(1)(c) that a general aviation/helicopter precinct south of the main runway is reasonably necessary for achieving the NOR's objective.

"Reasonably necessary"?

[36] The Court identified two key decisions made by QAC in terms of the area plan required for the designation, namely:

(a) The type of runway (whether an instrument non-precision or instrument precision runway); and

(b) The aircraft design parameters (whether a Code D aircraft would operate at the Airport).

[37] As to the first issue, the Court accepted Mr Morgan's evidence that:

> ... because of the terrain constraints inhibiting ILS approaches the final stage of an approach needs to be conducted by assuming a visual approach at 400 ft above ground level, which also means no more than a 150m runway strip width is needed.

[38] The Court also appeared to accept the evidence of ANZL and RPL and that there is no suggestion of Code C aircraft being phased out and indeed the converse appears to be the case.

[39] The Court then observed whether the works or designation, like these findings, is reasonably necessary for achieving the objective of QAC. The Court observed:

> [139] On the issue of whether the works or designation is reasonably necessary for achieving the objective of QAC the evidence is clear: within the planning horizon under negotiation there is no nexus between the NOR objective and enablement of Code D aircraft operating at Queenstown Airport. The predicted growth is able to be achieved using Code C aircraft.
>
> [140] For the same reason we find that there is no nexus between the NOR's objective and the provisioning for an instrument precision approach runway.

[40] Significantly, for the purposes of identifying the scope of the designation the Court observes:

> The consequences of the findings are this: the provision of an instrument non-precision approach runway and Code C parallel taxiway would reduce the lateral extent of the land required by 97.5m along the approximately 1,000m length of the common boundary with RPZ, being a total land area of about 9.75 hectares. Put another way, the land required for the designation would be reduced from around 160m into the RPZ to around 60m. We are not, however, required to approve the Code C parallel taxiway. Land within the existing designation is available for this purpose and it is a matter for QAC to decide whether to construct the same.

[41] And further:

> [142] Subject to what we say at [164] in all other respects we conclude that the work and designation is reasonably necessary for achieving QAC's objective. We prefer Mr Munro's assessment of the comparison of area requirements for the northern and southern precincts as it comprehensively addresses the proposed building and infrastructure. We found limited assistance in the area requirements produced by RPL's witnesses as these do not include all components of the aviation precinct or use different measurements to assess the components. ...

Effects on the environment

[42] The Court identified three categories of effects, namely noise, landscape and amenity, and traffic and transportation.

[43] As to noise, the Court was satisfied that with the resolution of PC35, the extension of the airport will not preclude opportunities for future development within the Remarkables Park Zone. The Court therefore concluded that this aspect of the NOR to locate the helicopter precinct on the southern side of the airport was not in tension with the planning instruments.[11]

[44] Other issues were said to be manageable by reference to operational plans or via an outline plan of works.

[45] Traffic management and access are not a feature of this appeal and I do not address them further. Nor do I address the Court's summaries in relation to landscape effects as they are not a matter subject to appeal.

Minister's reasons for direct referral

[46] The Court agreed with the Minister's statement that:

> Queenstown is a world renowned tourist destination and expansion of the Airport is likely to affect Queenstown, which is considered to be a place or area of national significance.

[47] The Court also observes that the NOR should be considered in the wider context of other far reaching proceedings before the Environment Court, including QAC's privately initiated PC35 and a second NOR also to amend Designation 2 and PC19.[12]

Part 2 of the Act

[48] The Court's decision focused on s 7(b), (c) and (f).

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11 Refer to [157].
12 Refer [207].

[49] Dealing first with s 7(b) (efficient use of resources), the Court observed that in this case the economists agreed that it was not possible to monetarise all the benefits or costs associated with the NOR. The Court observed that decisions on costs and economic viability or profitability of a project are not matters for the Court.[13] The Court then observed that a cost benefit analysis may be relevant and informative of matters in s 171(b) and s 7(b) but that does not elevate that matter to a criterion to be fulfilled. The Court then assesses the evidence produced by other parties, including that of Dr T Hazeldine, Professor of Economics at the University of Auckland, Mr Ballingall, an economist employed by the New Zealand Institute of Economic Research, and Mr Copeland.

[50] The Court observed that Professor Hazeldine's evidence was focused on whether the designation was reasonably necessary to achieve its objective, and having taken a different view found his concluding remarks of limited assistance.

[51] It then observes that the key difference between Mr Ballingall and Mr Copeland lies in the relevance of a cost benefit analysis for options which have been considered and discounted by requiring authorities. It says that Mr Copeland's approach is like an economic assessment considering the use of the aerodrome with or without Lot 6.

[52] The Court agrees with Mr Copeland that QAC is not subject to any requirement of NZ Treasury or any other government agency when presenting its NOR. It observes that a cost benefit analysis of the alternatives may be relevant and informative of the matters in s 171(1)(b), and in particular whether adequate consideration was given to alternatives in circumstances where a requiring authority either does not have an interest in the land or the work will have a significant adverse effect on the environment.[14]

[53] But as the Court did not have any cost benefit analysis the Court reached various conclusions qualitatively on operational efficiency and externality costs. The relevant conclusions were as follows:

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13 Citing *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

14 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [220].

Operational efficiency

(a) an instrument precision runway and a Code D taxiway is an *inefficient* use of part of the Lot 6 land when it is unlikely these uses will establish;

(b) a general aviation/helicopter precinct including air and landside buildings, infrastructure and landscaping is an *efficient* use of part of the Lot 6 land;

(c) it would be an *efficient* use of land to co-locate the Code C corporate jets south of the main runway in proximity to the Code C taxiway on the basis that QAC elect to build a Code C taxiway in this location;

(d) a hybrid alternative would be *inefficient* in that it would compromise the benefits which would accrue from the collocation of all operations on one site, including for example, shared support services, shared parking, shared accessways within the precinct, proximity for day to day interactions among operators and for customers, many of whom will be unfamiliar with the Airport, knowing that all flightseeing and helicopter operations are located in one precinct.

[54] As to externalities, the view is expressed that the western access imposes an unacceptably high cost on the public. It also said that:

> ... inadequate level of landscape mitigation proposed by QAC would create externality costs to the public using the airport facility and RPL in the development of its land.

[55] It concluded however that the effects are able to be adequately mitigated.

[56] As to s 7(c) and (f), the Court observed that even with conditions, the amenity values and quality of the environment within RPZ will not be fully maintained and that is an outcome to be taken into consideration when making an ultimate determination.

[57] The Court then turned to s 5, "the purpose of sustainable management" and adopted the longstanding approach recommended by the Court in *North Shore City Council v Auckland Regional Council (Okura)*,[15] namely that it is necessary to compare the conflicting considerations, their scale and degree and relative significance or proportion in arriving at the final outcome.

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[15] *North Shore City Council v Auckland Regional Council (Okura)* (1996) 2 ELRNZ 305, [1997] NZRMA 59 (EnvC).

[58] The key conclusion is then drawn:

> [231] For the reasons we have given, an insufficient nexus has been established between fulfilling the QAC's objective and making provision for an instrument precision approach runway and Code D parallel taxiway to support the use of RPL's land for these purposes. The balance of the work will be achieved at the cost to RPL of not being able to use the affected resources it owns for purposes authorized by the district plan. This is recognized and if required there is legislation to deal with any related considerations which may arise (such as compensation).

[59] The Court then concludes:

> [236] ... Overall we find the significant benefits to QAC and the wider community of developing and using the affected resources in the manner proposed, subject to the modifications and the conditions we have identified to avoid, remedy or mitigate adverse effects on the environment, to be consistent with the sustainable management purpose of the Act.

Jurisdiction on appeal

[60] Section 299 of the RMA confers a right of appeal on questions of law only. As stated in *Countdown Properties (Northland) v Dunedin City Council*:[16]

> …this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[61] Plainly also, I am not concerned with substantive merits of any conclusion. Rather, I must be satisfied that the conclusion has been arrived at by rational process.[17]

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[16] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

Statutory frame

[62] In order to properly frame the appeals, it is necessary to explain the legislative scheme as it relates to NORs.

[63] This proceeding came before the Environment Court by virtue of the exercise of powers by the Minister under s 147 of the Resource Management Act, after receiving a recommendation from the Environmental Protection Authority (EPA). In reaching a decision to refer, the Minister is required to apply s 142(3) dealing with whether the matter is, or is part of a proposal of national significance. This provides a cue to the importance of the underlying proposal.

[64] Section 149U sets out the relevant gateway tests for approval or otherwise of a notice of requirement. It states:

> **149U Consideration of matter by Environment Court**
>
> (1) The Environment Court, when considering a matter referred to it under section 149T, must-
>
> (a) have regard to the Minister's reasons for making a direction in relation to the matter; and
>
> (b) consider any information provided to it by the EPA under section 149G; and
>
> (c) act in accordance with subsection (2), (3), (4), (5), (6), or (7), as the case may be.
>
> ...
>
> (4) If considering a matter that is a notice of requirement for a designation or to alter a designation, the Court—
>
> (a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and
>
> (b) may-
>
> (i) cancel the requirement; or
>
> (ii) confirm the requirement; or
>
> (iii) confirm the requirement, but modify it or impose conditions on it as the Court thinks fit; and

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[17] Refer also *Stark v Auckland Regional Council* [1994] NZRMA 337 (HC) at 340.

(c) may waive the requirement for an outline plan to be submitted under section 176A.

...

[65] The reference at subs (4) to s 171(1) incorporates the criteria ordinarily applicable to designation processes.

[66] The key criteria in s 171 are as follows:

> **171 Recommendation by territorial authority**
>
> (1A) When considering a requirement and any submissions received, a territorial authority must not have regard to trade competition or the effects of trade competition.
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to-
>
> (a) any relevant provisions of-
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if-
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
>
> (d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> ...

[67] The power to cancel, confirm, or confirm but modify under s 149U(4)(b) mirrors the equivalent power enjoyed by the Environment Court under s 174(4) in respect of appeals from decisions of requiring authorities.

[68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement.[18] Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.[19] Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance;[20] shall have regard to other matters specified at s 7 and shall take into account the principles of the Treaty of Waitangi.[21]

[70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.

Part B

[71] QAC raises five separate questions of law, namely:

1. Did the Court wrongly interpret cl 3.9.9 and Table 3/1 of Civil Aviation Authority Advisory Circular AC139-6?

2. Is the minimum separation distance between a runway and a parallel

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18 See Briar Gordon and Arnold Turner (eds) Brookers Resource Management (looseleaf ed, Brookers) at 1-1470 and *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).
19 *McGuire* at 594.
20 Section 6.
21 Section 8.

taxiway for Code C aircraft (in the absence of an aeronautical study indicating that a lower separation distance would be acceptable) 93 metres or 168 metres on the true construction of AC139-6?

3. Did the Court err in failing to have regard to whether its conclusion that a parallel taxiway for Code C aircraft should be 93 metres from the runway would not be able to be implemented unless the Director of Civil Aviation found it to be acceptable after considering an aeronautical study?

4. Did the Court err in directing QAC as to the purpose for which land within the existing aerodrome designation can be used?

5. Did the Court err in holding that there needed to be a nexus between QAC's NOR objective and the provision for an instrument precision approach runway at Queenstown Airport?

The CAA standards

[72] The underlying and critical issue in relation to the first three questions is whether the Environment Court could impose conditions based on an interpretation of Civil Aviation Authority (CAA) standards for separation distances that ultimately might prove to be erroneous and thereby disenable the efficient operation of the designation. The significance of this and the separation distances is shown by an illustration produced by Mr Gardner-Hopkins. I attach this to the judgment as Annexure B.[22] It will be seen that the overall space requirement increases from 119m to 194m, depending which separation distance for Code C aircraft is adopted. If the latter separation distance applies, then a considerably larger encroachment into RPL's land might be needed. I propose to resolve this issue first.

[73] Mr Gardner-Hopkins submits that the Environment Court had no option but to assess the effect of the standards because they drove the land requirements of the

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[22] Mr Kirkpatrick disputed the subtitle references to "Non Precision" and "Precision", but otherwise consented to the production of Annexure B.

airport. Significantly QAC's counsel, having taken expert advice accepted in the Environment Court that 93m was a sufficient separation distance between the main runway and the parallel taxiway under the standards for Code C aircraft. There was therefore no other basis upon which the Environment Court could resolve the factual evaluation of QAC's land requirements. It was an evaluation of agreed fact and one that is not amenable to challenge in this Court.

[74] Mr Kirkpatrick immediately accepts that he must resile from the position he adopted in the Environment Court. He accepted the evidence of Mr Morgan that the appropriate separation distance for Code 4/C aircraft is 93m and that the Environment Court relied on that evidence (being the only evidence available to it). However he submits that immediately after the interim decision was released he advised the Court of the potential difficulties with Mr Morgan's and the Court's assessment, namely that the CAA might insist on a greater separation distance with the result that a key component of designation would be disenabled, as QAC would not have sufficient land to make a parallel taxiway. He says that the requisite separation distance could be as much as 168m. He contends that there is no bar to counsel seeking to resile from a concession where it is in the interests of justice to do so.

[75] Mr Kirkpatrick also submits that the interpretation of the standards is an assessment of law, not fact. In short, he says that the Court is engaged in an assessment of the separation distance required by law, but that the jurisdiction to make that assessment is reposed with the Director of CAA.[23]

Assessment

[76] I agree with Mr Kirkpatrick that the efficacy of the separation distance of 93m is dependent on the approval of the Director of Civil Aviation. If s/he does not approve the 93m separation distance and requires a greater separation distance, a key component of the designation works cannot then be enabled. A condition with that disenabling effect cannot be lawful unless it is the product of a thorough evaluation

[23] Civil Aviation Rule 139.51(c).

in terms of s 171, because it is, in substance, a condition derogating from the grant.[24] Regrettably, the Environment Court did not appear to turn its mind to the potentially disenabling consequences of a 93m limitation prior to the interim decision. Accordingly, the Environment Court did not discharge its duty to consider the effects of the designation in terms of s 171.

[77] In saying this there can be no criticism of the Environment Court. It logically assumed that the proper separation distance was 93m given the agreement of all parties. Ordinarily I would refuse to grant relief in circumstances where the Environment Court has proceeded to a decision on an agreed factual basis. But here the impugned spatial limitation might preclude a significant component of the designation activity and therefore render nugatory a key enabling justification for it. In the absence of the assessment of the effects of this potentially significant outcome, the decision is flawed.

[78] It is also reasonably apparent that Mr Kirkpatrick was agreeing to the evidence about separation while focused on Code D rather than Code C aircraft. Further, he sought to have the matter addressed by the Environment Court prior to the final decision, but the Court ruled that it had already decided the evidential issue. But with respect to the Court's reasoning on this, the Court had not, on the face of the decisions, assessed the significance of the disenabling effect of a negative decision from the Director of Civil Aviation. Whatever the Court's finding of fact or law about the standards, that evaluation needed to be made. Against a backdrop where we are dealing with a project of national significance, this 'error' is significant.

[79] Given the foregoing it is not necessary for me to address the interpretation of the standards and I refuse to do so. In short, there are major problems with this Court, on an appeal under the RMA, purporting to inquire into the interpretation of the standards that must still ultimately be applied by the Director of Civil Aviation. It quickly became abundantly apparent to me that the interpretation of the standards would need to be premised on a sufficient understanding of their practical effect, in

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[24] As to the principle of non derogation refer *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at [24].

context, and the interrelationship of the various standards. It appears from submission from the Bar that they are disputable matters and that the Court would be assisted by expert evidence on them. Normally on an appeal like this I would have the benefit of a detailed discussion about the key issues in the decision of the Environment Court, or in terms of my supervisory jurisdiction, an assessment from the Director. I have neither. Furthermore, whatever I say here could not bind the Director, or if it could, runs the risk of usurping the statutory function reposed in the Director and then without the benefit of the Director's assessment of those standards in context.

Existing rights

[80] Questions 4 and 5 relate to the effect of the modified designation on existing rights. Mr Kirkpatrick initially claimed that the Court incorrectly altered the scope of the existing designation by purporting to exclude the potential for instrument precision approaches. He says that the present NOR did not seek to revisit any existing grant. Therefore while the Court could refuse to enlarge the designation to enable an instrument precision approach, it could not thereby extinguish an existing right to pursue that course if QAC deems it feasible to do so in the ordinary operation of its business. He says that the Court was also wrong to resolve there was no nexus between the instrument approach and the objective of the NOR to the extent that this might preclude such an approach in the future.

[81] On closer examination Mr Kirkpatrick accepted that observations made by the Court about nexus and necessity did not translate into conditions or limitations on the internal operations of the Airport.

Assessment

[82] The decision is not purporting to limit the internal operations of the Airport in any material way beyond the existing limits of the current designation and the extent of the designation area. I was not taken to any changes to the designation that had this effect. I do not think therefore that there is anything against which to attach the points of law raised for the purpose of relief. In short, the points of law do not call for a remedy so I see no need to address them.

Part C

[83] RPL claims that the Environment Court acted outside its jurisdiction by purporting to cancel part only of the NOR. It also raises the following questions of law:

1. Should the term 'requirement' in s 168(2) of the Act be defined as meaning 'essential'?

2. Should the term 'requirement' in s 168(2) of the Act be construed in light of s 40 of the PWA?

3. Is the principle of fairness and equitable issues (estoppel) relevant under s 171(1)(d)?

4. Should the duty under s 16 of the Act have formed part of the Court's assessment of alternative locations for FATOs (Final Approach and Take Off)?

5. Did the Court fail to consider relevant alternatives under section 171(1)(b) of the Act?

6. Should the Court have given weight to the absence of any assessment by the QAC of alternatives raised by RPL and Air New Zealand Limited (ANZL) under section 171(1)(b) of the Act?

7. Would a strict application of the "reasonably necessary" test necessitate a determination of the best site for the works?

8/9. Having found that it should reject land required for works associated with a Code D taxiway and a precision approach runway, did the Court subsequently err in:[25]

[25] Items 10.8 and 10.9 of the appeal were consolidated and recast as above.

(i) Finding that the QAC had given adequate consideration to alternatives (section 171(1)(b))?; and

(ii) Finding that the remainder of the works were reasonably necessary (section 171(1)(b))?

10. Did the Court err in determining that the NOR was efficient in the absence of any cost benefit analysis?

11. Does the inconsistency between the QAC's position at the hearing that it could undertake the work and meet the NOR's objective on 8.07 ha of land and the content of its High Court appeal and Public Works Act Notice render the NOR hearing process unfair?

12. Did the Court err by including an existing substation within the land to be designated for airport purposes?

Jurisdiction and procedural fairness

[84] On the question of jurisdiction under s 149U(4) Mr Somerville QC submits:

(a) The Court decided to cancel part and to confirm part of the NOR (refer interim decision cited at [15] above);

(b) Referring to *Takamore Trustees v Kapiti Coast District Council*[26] s 149(U)(4)(b) empowered the Court to cancel or confirm or confirm with modification but it does not expressly empower the Court to mix and match these alternatives;

(c) The scale of the cancellation (a 50% reduction) logically precludes confirmation of the balance – the NOR has been altered so fundamentally that even QAC says that the balance will not achieve the stated objective of the NOR;

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[26] *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [37]-[38].

(d) The Court erroneously relied on *Bungalo Holdings Limited v North Shore City Council*[27] to the effect that the Court had jurisdiction to reduce the scale of the proposed designation when that decision concerned the scope of the discretionary assessment under s 171, not the power to grant relief under s 174;

(e) Part cancellation carries the risk of procedural unfairness in that affected persons may have challenged the altered NOR and did not do so;

(f) There being no power to confirm part only of the NOR, that part of the decision may be set aside without the need to refer the decision back to the Environment Court.

Assessment

[85] I do not accept that the interim decision to cancel part only of the NOR was flawed for want of jurisdiction for the following reasons.

[86] First, the meaning of s 149U(4)(b) from its text and in light of its purpose is reasonably clear.[28] The power to "modify it or impose conditions on it as the Court thinks fit" literally and logically includes the power to modify the scale of the NOR as occurred here; and there is no obvious reason to read down those words to preclude a reduction in scale.[29] This interpretation better serves the overt scheme of the requiring provisions to enable necessary works with appropriate effects, having regard to the criteria expressed at s 171. Further, a flexible power to modify will, in my view, better enable decision makers to carry out their functions in a manner that is consistent with the broad purpose of sustainable management. Conversely, a narrow interpretation of the power may unduly inhibit the capacity of functionaries to achieve that purpose.

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27 *Bungalo Holdings Limited v North Shore City Council* EnvC Auckland A052/01, 7 June 2001.

28 Interpretation Act 1999, s 5(1).

29 Cf by analogy see *West Coast Regional Council v Royal Forest & Bird Protection Society of New Zealand* (2006) 12 ELRNZ 269, [2007] NZRMA 32 (HC) (cited by Mr Gardner-Hopkins). See also *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) – the Privy Council said in the designation context that "a full right of appeal on the merits is contemplated" and the Environment Court had "wide powers of decision" at 595.

[87] Second, no legitimate question of procedural unfairness arises in this case – the scope of works and envelope of effects is substantially reduced as a consequence of the modification. The prospect of affected parties not having submitted because a much larger proposal was notified is, in my view, highly unlikely.

[88] Third, the reliance placed on *Takamore Trustees v Kapiti Coast District Council* by RPL is misplaced. The Court in that case was confronted with a submission that part of a road route could be cancelled and redirected with the result that an altogether different proposal from that notified would have been enabled. The observation of the Court therefore that "cancellation of a significant piece of the NOR is well beyond modifying a proposal" is understandable, but altogether removed from the present facts. Unlike *Takamore*, the revised designation falls entirely within the envelope of the notified proposal.

[89] Finally, to the extent that the Court decided that the NOR was part cancelled, rather than modified, the error was not sufficiently material to warrant referral back. The difference in this context is semantic.

[90] Accordingly this ground of appeal is dismissed.

Essentiality, PWA, Best Option

[91] Questions 1, 2, 7, 8 and 9 concern the meaning of the terms "requirement" and "reasonably necessary". I deal with them together.

[92] Mr Somerville submitted:

(a) The Environment Court erred when it held that "requirement" under s 168 and the phrase "reasonably necessary" under s 171 meant something less than essential (refer [94]).

(b) Given that the NOR was a precursor to compulsory acquisition of private land, the Court should have instead adopted a narrow meaning of requirement or reasonably necessary, namely essential as this would accord with the common law approach to interpretation where

property rights might be subject to the coercive powers of the State.[30]

(c) The Environment Court further erred by refusing to interpret the meaning of "requirement" in the same way as the term require or required has been interpreted under s 40 of the PWA.[31]

(d) The requiring provisions of the RMA and the acquisition powers under the PWA touch and concern the same underlying subject matter and should be applied consistently. And, as the Court of Appeal said in *Seaton* (not overruled on this point), s 24(7) of the PWA provides an appropriate guide to the legislative policy in terms of decision making involving derogation from and the taking of property for public purposes.

(e) Furthermore, with the rejection of the requirement for a precision runway and Code D aircraft taxiway, the taking of private land is not reasonably necessary in the sense of essential.

Assessment

[93] The language of "requirement" and "reasonably necessary" in ss 168(2) and 171(1)(c) (and in s 24(7) of the PWA) are standards used in everyday language. They should require no undue elaboration. But in the present context, involving the coercive powers of public authorities for public purposes, the words "requirement" and "reasonably necessary" are statutory indicia that any proposed works must be clearly justified by reference to the objective of the NOR. This aligns with the threshold identified by the Court of Appeal in *Seaton* when dealing with the concept of "required" and given the prospect of compulsory acquisition.[32] Whether the scope of the NOR is clearly justified, in context, is of course a question for the Environment Court.

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30 Referring to *Edmonds v Attorney-General* HC Wellington CIV 2000-485-695, 3 May 2005; *Deane v Attorney-General* [1997] 2 NZLR 180 (HC).

31 Referring to *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA).

32 *Minister for Land Information v Seaton* [2012] 2 NZLR 636 (CA) at [31]. Note the substantive decision of the Court was overturned by the Supreme Court, but these observations were not tested or criticised. See *Seaton v Minister for Land Information* [2013] NZSC 42.

[94] The Environment Court adopted what might be called the orthodox threshold test of reasonably necessary namely:[33]

> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

[95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy.

[96] I acknowledge that in *Seaton* the Court of Appeal used the concepts reasonably necessary and essential interchangeably.[34] I also accept that a NOR that will derogate from private property rights calls for closer scrutiny.[35] Further, I think that the Environment Court was mistaken when distancing the PWA from the designation powers under the RMA. Both statutes deal with the coercive powers of public authorities to derogate from private property rights. They should be interpreted in a consistent way. This suggests that the Environment Court erred by adopting a threshold test of falling between essential and desirable. But the Environment Court's rejection of RPL's submission that "requirement" and "reasonably necessary" mean "essential" must be understood in the sense that the Court was using that word. As Mr Kirkpatrick highlighted, the Court equated "essential" with the proposition that the "best" site must be selected.[36] And I agree with him that this would set the test beyond the required threshold of "reasonably" necessary. Indeed to elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose. If

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33 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [51].
34 *Minister for Land Information v* Seaton [2012] 2 NZLR 636 (CA) at 644-645.
35 *Deane v Attorney-General* [1997] 2 NZLR 180 (HC); and is to be distinguished from planning regulation simpliciter: *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.
36 *Re Queenstown Airport Corporation Limited* [2012] EnvC 206 at [94].

that was the intention of Parliament then I would have expected express language to that effect (as it has done in relation to s 16 and the duty to use the "best" practicable option for noise mitigation).[37] I therefore discern no error in the Court's adoption of a threshold test that falls below this benchmark.

[97] If I then turn to the substance of the Court's assessment, it is evident that the Court carefully evaluated whether the works were clearly justified. In this regard, the Court was aware that NORs that affect private property must be afforded "less tolerance".[38] I also agree with Mr Kirkpatrick that the various passages of the judgment illustrate that the Court sought clear justification for the scope of the NOR.[39] And it is important to view the judgment as a whole. When this is done, very careful consideration was plainly given to whether the works were justified.

[98] Accordingly, I see no definitional flaw of substance. This ground also fails.

Fairness and substantive legitimate expectation

[99] Question 3 concerns the relevance of fairness in designation proceedings. Mr Somerville contends:

(a) The Environment Court erroneously did not consider the unfairness to RPL resulting from a NOR, deeming it to be irrelevant as a matter of law and factually (refer [54]-[55]).

(b) Fairness is a mandatory relevant consideration as a matter of common law principle, and at the very least is a relevant consideration under s 171(1)(d).

(c) The previous dealings between RPL and QAC involved land transfer and other agreements concerning the use of the land now subject to the NOR, including the following clauses:[40]

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37 Refer also to discussion in *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [118]-[120].

38 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [94].

39 For example at [112]-[115], [139]-[142], [226], [236].

40 Deed Settling Resource Management Issues Between Queenstown Airport Corporation Limited

> 3.3 The land transferred to RPH pursuant to clauses 3.1 and 3.2 and other RPG holdings shown on Figure 6-1R and Figure 6-3R referred to below, shall not thereafter be the subject of any claim or requirement by QAC other than Air Noise Boundary and Airport Approach and Land Use Controls and aerodrome purposes designations/requirements QAC needs to maintain for the continuing operation of Queenstown Airport in accordance with agreed present and future layout.
>
> ...
>
> 6.3 RPG shall after the land exchange, utilise the buffer land only for rural and/or recreational uses and infrastructural utilities not of a noise sensitive nature in terms of NZS6805. ... This limitation shall be the subject of a registrable restrictive covenant in favour of QAC which shall enure during the life of this airport at its present location. The term "recreational uses" expressly allows for provision of a golf course and associated facilities.

(d) In a subsequent agreement, the parties agreed:

> 15.2 ... To the extent that the QAC's aerodrome purposes designation has not already been uplifted, QAC shall modify that designation to remove it from Areas A, B, C and D and all legally vested roads along with the other parcels of land described in clauses 3.3 and 6.4 of the 1997 deed.

(e) As a minimum, these dealings gave rise to a legitimate expectation on the part of RPL that QAC (as the requiring authority) and the Environment Court (as the confirming authority) would give due consideration to alternatives that did not involve the taking of RPL's land recently acquired from QAC as part of the transfer agreement.

(f) Contrary to the findings of the Environment Court, there was direct reference of the existence of the land transfer agreements and the reliance on them by RPL. For example RPL's submission stated:[41]

> 3.21 By way of background, it is important to note that the QAC exchanged land with RPL under a series of formal contractual agreements. This raises estoppel issues. The land now owned by the QAC on the northern side of the airport that it is seeking to rezone to enable urban activities

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and Remarkables Park Limited, October 1997.

41 Refer also to the Statement of Evidence of M Foster at 7.6, Statement of Evidence of S Sanderson at 71, and transcript at Vol. 4 p 1156, Vol. 5 at 1405 and 1415, and see the covenant attached to the notice of requirement.

> was previously owned by RPL. RPL exchanged that land for much of the land that is now the subject of the QAC;s NOR. In short, QAC seeks to keep the land it acquired from RPL through the contractual agreements and take back the land it agreed RPL should acquire.
>
> 3.22 The land swap referred to above was part of a comprehensive zoning settlement including consent orders endorsed by the Environment Court, to which the QAC and the Queenstown Lakes district council was a party. The QAC is effectively seeking to unravel those agreements and zonings, despite previously consenting and committing to them. In doing so, the QAC is undermining a sustainable and integrated zoning pattern already endorsed by the Court.

(g) The finding also that the prospective use of QAC's land in preference to RPL's land was suppositious was, in light of the historical position up to 2010, not an available conclusion on the evidence.

(h) The reference to PC19, and the scarcity of industrial land, could not justify a finding that the use of QAC land was suppositious (refer [89] and [90]) – and the Court could not properly fill the gap left by QAC's assessment of alternatives with its own supposition about future use of QAC's land.

(i) The Environment Court's approach to s 24(7) and that the question of fairness need not be decided was flawed (referring to [55]).

[100] Mr Kirkpatrick submits that the key evidence relied upon by RPL was never produced to the Court and there are no findings of fact upon which I can reasonably graft a legitimate expectation. He says that the key cl 3.3 was not referred to at the Environment Court hearing and there is no evidence that QAC bound itself to exclude RPL's land from a future designation. He also says that to the extent that there was any contractual right of the nature claimed, it could not fetter the proper exercise of a statutory discretion; though he accepted that whether there was a proper exercise of discretion depended on the circumstances.[42] He also accepted that, if QAC did contract to avoid the use of RPL's land, that this might give rise to a legitimate expectation that RPL's rights would be considered before any final

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[42] Citing *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 548.

decision is made and that this might require an assessment of alternatives not involving RPL's land. He said however that in any event the alternatives were thoroughly considered, either before the NOR and during the Environment Court hearing.

[101] Mr Kirkpatrick also rejects the suggestion that assessment at s 24(7), namely whether the works are "fair, sound, and reasonably necessary", should be applied in the context of s 171(1)(b). He says that the Environment Court is bound, like all Courts, to securing fair process, and that substantive fairness is an element of sustainable management. He also accepts that the language used in both sections should be interpreted consistently. But that does not mean that the criteria expressed at s 171 are overlaid by the fairness and soundness assessments contemplated at s 24(7).

[102] As to the finding that the alternatives were "suppositious", Mr Kirkpatrick says this was a finding available to the Court (and I address the substantive issue below at [115]-[126]). The Court I am told also put various questions to Mr Foster concerning the issues confronting PC19 and provided the parties with an opportunity to comment. Therefore he says, no clear procedural unfairness arises.

Assessment

[103] This ground of appeal brings into focus the fairness of a requirement affecting RPL's land in light of QAC's previous dealings with RPL. RPL's basic contention is that it held a legitimate expectation that Lot 6 would not be used for aerodrome designation purposes, or if it is used, all alternatives not using RPL land would be thoroughly explored. The Court appeared to decline to entertain this argument because fairness is not an express criterion under s 171 and in any event there was no evidence to support a legitimate expectation.[43]

[104] The resolution of this appeal point is vexing because of the way it appears it was argued in the Court below by analogy to s 24(7) of the PWA and the focus of the

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[43] *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [54]-[55].

Court in light of that argument. Nevertheless I consider that the Court erred for the following reasons.

[105] Parliament will be presumed to legislate consistently with minimum standards of fairness, especially when dealing with coercive powers of the State.[44] Moreover, the scheme of the Act dealing with designations is purpose built to secure a fair outcome having regard to the broad criteria specified at s 171 and in light of Part 2, with full rights of participation and then appeal rights on points of law. Indeed, as the Privy Council stated in *McGuire v Hastings District Council*,[45] the jurisdiction of the Environment Court under the RMA is broad, with the administrative law jurisdiction of the High Court very much a residual one. The Environment Court therefore plays the key role in providing judicial oversight in relation to the designation process. The central issue therefore is not whether fairness is a mandatory relevant criterion (as per s 24 of the PWA) but whether fairness or any alleged unfairness is relevant to the evaluation under s 171 in the circumstances of the case. The Court erred because it did not address this central issue.

[106] As to whether RPL's claimed unfairness is prima facie relevant, the doctrine of legitimate expectation is also not new to resource management law. In *Aoraki Water Trust v Meridian Energy Ltd*[46] the High Court recognised that the doctrine of legitimate expectation might be applied in the RMA context.[47] The Court in that case was dealing with the expectation of water rights holders that the regional council would not derogate from their water rights grants unless specifically empowered to do so by the RMA.[48] The application of the doctrine will however depend entirely on the facts of the particular case. But a key ingredient is whether there has been reliance on an assurance given by a public authority, made in the lawful exercise of the authority's powers. If so, the affected person may legitimately expect compliance with that assurance subject only to an express statutory duty or

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44 Refer: Lord Steyn in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC539 (HL) at 591.
45 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [25].
46 *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZLR 268 (HC).
47 At [39]-[42].
48 At [46].

power to do otherwise.[49] In the present case, that must mean satisfaction of the criteria expressed at s 171 and in particular at subs (1)(b) and (c), having regard to any relevant legitimate expectations, properly established. Fairness would then implore an outcome which is consistent with those expectations provided that the outcome met the statutory criteria and achieved the statutory purpose. Conversely, the Court, like QAC, cannot be bound to give effect to those expectations where to do so is inconsistent with the requirements of s 171.[50] In short the Court's jurisdiction, though wide, is framed by the scheme and purpose of the RMA.[51]

[107] Unfortunately the Court's substantive fairness assessment was diverted by the approach taken to the production of the contracts relied upon by RPL. The Court appeared to assume that it did not need to consider the contracts themselves based on submission of counsel. On closer inspection of the record I accept Mr Somerville's contention that the Court was not invited to "interpret" the contracts, there being no serious dispute about the key representations, but that they remained central to the assessment of unfairness.

[108] I also accept Mr Somerville's basic contention that the contracts were themselves evidence of reliance. In short, the contracts represented the exchange of mutually enforceable promises, for valuable consideration with consequences for breach. The contracts recorded land swaps, that future airport development would accord with agreed plans and not otherwise (and I understand no agreed plan was produced showing Lot 6 would be developed for aerodrome purposes), that QAC would withdraw the aerodrome designation from Lot 6 and that Lot 6 would act as a "buffer" zone, i.e. as between airport activities and RPL's activities. Also attached to one of the contracts were plans showing "potential Helicopter Area 7 Hectares" to the north of the main runway."[52] Effect was given to these contracts by the parties, including the imposition of a covenant over Lot 6 and the withdrawal of the aerodrome designation over Lot 6. I understand that these facts were not challenged.

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49 Refer *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

50 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

51 Furthermore, the Environment Court does not have jurisdiction to examine the legality of the decision to notify a NOR. Any challenge to legality of QAC's decision to notify must still be brought by way of judicial review. *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112 at [38].

52 See transcript at 1406.

It is therefore at least arguable that on the face of the agreements it was the expectation of both parties that Lot 6 would remain a buffer zone.

[109] The outcome of all of this is that the Court never correctly assessed the claim based on legitimate expectation to the extent that it might be relevant to the s 171 evaluation.

[110] I deal with the materiality of this error below at [146].

Section 16

[111] Mr Somerville claims that the Court erred by not holding that s 16 applied as if it were an additional criterion. Section 16 imposes the following duty:

> **16 Duty to avoid unreasonable noise**
>
> (1) Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or… the coastal marine area, shall adopt the best practicable option to ensure that the emission of noise from that land or water does not exceed a reasonable level.
>
> (2) A national environmental standard, plan, or resource consent made or granted for the purposes of any of sections 9, 12, 13, 14, 15, 15A, and 15B may prescribe noise emission standards, and is not limited in its ability to do so by subsection (1).

[112] He said that it is commonsense to adopt an approach that is consistent to the performance of this duty, that is to take a best practical option approach to the assessment of alternatives for Final Approach and Take Off (FATO) locations. He said that while s 16 was not triggered in every case, it should have been in this case. RPL claims that sites on QAC's land are more likely to meet the best practicable option (BPO) requirement than the proposed sites on Lot 6.

Assessment

[113] I reject this ground. It is necessary to record the key part of the decision:

> [58] We hold section 16 is not to be applied as if it were an additional criterion to subsection (1)(a)-(d) of section 171. In some cases adopting the best practicable option may be useful check for the decision-maker,

> particularly when assessing the adequacy of the alternatives under consideration, but not in every case.

[114] The refusal to apply s 16 as an additional criterion must be read together with the observation that "in some cases adopting the best practicable option may be useful check for the decision-maker". Plainly the Court considered whether the s 16 duty and BPO was relevant to the evaluative exercise and decided that it was not. For my part this is an orthodox approach to the assessment of effects. Moreover, the s 16 duty imposes a minimum BPO requirement in circumstances where the effects of the noise are not reasonable. It is not a duty that applies where the noise effects are reasonable to their context. Whether or not noise levels can be mitigated to reasonable levels is a matter for the Court to assess, and whether BPO is required to achieve those levels is an assessment of fact, in each case, for the Court. Accordingly, the Court made no error of law by not insisting on adopting a BPO approach to the assessment of alternatives.

Assessment of Alternatives

[115] Questions 5, 6, 8 and 9 raise concerns with the assessment of alternatives.

[116] Mr Somerville submits that:

(a) The Court erroneously rejected an alternative site involving QAC owned land to the north of the existing designation on the basis that it was suppositious.

(b) The Court should have given weight to the absence of an assessment of this alternative by QAC.

(c) Further, as two of the five major reasons for the designation have been rejected, the alternative assessment by QAC proceeded from a false premise.

(d) Similarly, as the modified position was never assessed as an alternative, it could not possibly satisfy the adequacy criterion at s 171(1)(b). This is linked to the issue of jurisdiction and fairness,

and the implicit requirement that any modification must be one of the assessed alternatives.

[117] Turning to the merits, Mr Somerville says that the finding that the alternative to the north was suppositious was not available to the Court on the evidence. In fact he said that background showed that until 2010 the land was considered as appropriate for expansion. He also says that the Court placed improper reliance on PC19 and the scarcity of industrial land in Queenstown, there being no evidence or submission on the relevance or significance of these matters. He said that the Court must have relied on its own knowledge of those matters, but never afforded the parties the opportunity to comment other than through some questions from the Court to RPL's witness, Mr Foster, about the nature of the aviation activities and whether they might qualify as industrial.

[118] He points to the language of s 171(1)(b) which specifically requires the Court to consider "whether adequate consideration has been given to alternative sites". Thus, he submits, by failing to give weight to the absence of the assessment by QAC of the merits of the use of its own land, the Court has not discharged this statutory duty under s 171(1)(b).

[119] Mr Kirkpatrick responds that the Court had before it various master plans, including proposals to use QAC land to the north and outside of the existing designation. Plainly therefore QAC had previously considered various alternatives, including the one now raised by RPL. He says that there was evidence on which the Court might find that expansion to the north was suppositious.[53] He accepts that the Court did not raise with the parties the significance of the scarcity of industrial land in light of PC19, but that Mr Foster was tested on the proposition that aerodrome uses include industrial activity. In any event, he says the Court made a detailed examination of the alternatives, including on sites to the immediate north and rejected them. He specifically referred me to [112]-[115] of the decision (noted above) to demonstrate the careful assessment undertaken of alternatives by the Court. There was therefore no failure in terms of s 171(1)(b).

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[53] See submissions of Mr Kirkpatrick at [25] in reply to RPL's submissions. Mr Kirkpatrick cited evidence of P West and B Macmillan.

Assessment

[120] It is important to commence this analysis by referring to the language of s 171(1)(b) relevant to this ground of appeal. The Environment Court was required to have particular regard to:

> "whether adequate consideration has been given to alternative sites... if ... the requiring authority does not have an interest in the land sufficient for undertaking the work..."

[121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered.[54] But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.[55]

[123] RPL insisted that the Court was required to assess whether adequate consideration was given to locating the general aviation/helicopter precinct on land north of the main runway, including the undesignated land owned by QAC and/or QLDC. The Court responded that this option was suppositious for the following reasons (repeated here for ease of reference):

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[54] *Waitakere City Council v Brunel* [2007] NZRMA 235 (HC) at [29].

[55] Cf by analogy, *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [36] and [37].

> [89] Conceptual plans prepared by RPL for a general aviation/helicopter precinct north of the main runway included undesignated land owned by QAC within the area of PC19. Under these plans a general aviation/helicopter precinct would displace up to 4.52 hectares of industrial land within PC19. In proposing this option, RPL witnesses did not address the scarcity of industrial land within Queenstown (an important issue that PC19 *inter alia* seeks to address). There was some suggestion by the RPL planner, Mr M Foster, that aerodrome activities are industrial activities for the relevant activity areas within PC19.
>
> [90] We doubt Mr Foster's interpretation is correct and in the absence of any evidence in this proceeding or PC19 addressing the implications of an aviation precinct within PC19, particularly in relation to the urban form and function, we do not consider that PC19 land should be available as part of an alternative location. Activities relating to an aviation precinct appear to be outside those contemplated by the District Council when promulgating PC19.

[124] There are two immediate issues with this reasoning. First the Court introduces the scarcity of industrial land as a reason for rejecting QAC's land to the north of the designation. I am told that scarcity of industrial land was not mentioned in submissions or evidence and Mr Kirkpatrick said that reference to it cannot be found anywhere in the transcript. Second, the Court appears to shift the burden of demonstrating the efficacy of the suggested alternative to RPL in light of PC19. But the task of persuading the Court as to the adequacy of the consideration of alternatives always rested with QAC for the orthodox reason that QAC is seeking to persuade the Court that all relevant alternatives were adequately considered.[56]

[125] Having said all of that, as the Canadian Supreme Court said in *Housen v Nikolaisen*:[57]

> Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole

[126] And, it is too easy to alight on isolated passages in a judgment and to dismiss the full evaluation undertaken by the Court, based on detailed information, including expert evidence, about the assessment (and efficacy) of the various alternatives.

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[56] Cf *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC). And see *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP18/02, 7 June 2002.

[57] *Housen v Nikolaisen* [2002] 2 SCR 235 at 250, cited with approval by the Supreme Court of the United Kingdom in *McGraddie v McGraddie* [2013] UKSC 58.

[127] In this regard, the judgment also refers to reports produced in 2005, 2006, 2007 and 2008 considering sites for a new general aviation/helicopter precinct located within the existing aerodrome designation north of the main runway. The 2005 Master Plan expressly rejects such a precinct within Lot 6. It then records that QAC's advisor recommended in a 2007 report that general aviation flight-seeing operations be grouped north of the main runway.[58] However, in 2010, QAC's advisor changed its recommendation, concluding that a north-east precinct "is distinctively inferior".[59] While this north-east precinct appears to be located within the existing designation (and so is not synonymous with RPL's suggested alternative), it identifies problems with a northern location as distinct from a southern location and relevantly that: [60]

> ... the southern site would not require helicopters or fixed wing to cross runway 23/05 when departing to the south or east (a very common flight path), if departing north or west from the proposed northern site, it appears aircraft would still need to track south initially (crossing the main runway....

[128] The point of this observation is not to shore up an alleged deficiency in QAC's or the Court's assessment, but to illustrate with one example the detailed information before the Court and the reason why this Court must be slow to interfere with findings of fact by telescope.

[129] Problematically however, the Court identified "scarcity of industrial land" and PC19 as a key reason for treating the site to the north as suppositious. As there was no evidence about this, and no argument directly addressing its merits, the Court fell into procedural, if not substantive error. It may be that the Court treated scarcity of industrial land in Queenstown as a matter of uncontroverted fact.[61] Certainly recent decisions of the Environment Court and this Court about PC19 refer to the significant need for industrial land in Queenstown.[62] And the Court could not be criticised for referring to PC19 as it was a mandatory relevant consideration.[63] But

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58 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [76]-[81].

59 At [86].

60 Refer Assessment of Environmental Effects, 5.3.4; and Appendix T.

61 While the Environment Court is not strictly bound by rules of evidence, the capacity to take into account uncontroverted facts is allowed by s 128 of the Evidence Act 2006.

62 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817 at [25]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [563].

63 Section 171(1)(a)(iv) and s 43AAC.

RPL should have been invited to submit on the factual issue of scarcity if it was going to be the reason for rejecting RPL's alternative site as suppositious. As a minimum, and in the absence of any party raising the issue of scarcity of industrial land, RPL was entitled to notice of the Court's conclusions about that issue before it was used as a reason to reject RPL's objection. While I would ordinarily afford the Court a significant amount of latitude for the reasons mentioned at [125]-[126], an issue of procedural justice arose when the Court resolved a substantive issue relying on its own knowledge and without notice to the parties.[64]

[130] Accordingly the appeal on this point is allowed. I deal with materiality and relief below. It must be considered in light of my findings on the question of fairness.

Cost benefit analysis

[131] Mr Somerville submits that the Court erred by determining that the NOR was efficient in the absence of a cost benefit analysis.

[132] There is nothing in the language of ss 7(b) or 171(1)(b) that imposes a legal duty on the requiring authority to prepare a cost benefit analysis or requires the Court to consider a cost benefit analysis. As the Court noted, such an analysis may be very helpful and the failure to do one may mean that the Court finds that the assessment of efficiency and/or alternatives is inadequate. But rarely will the failure of the Court to require a cost benefit analysis amount to an error of law. Indeed the full High Court in *Meridian Energy Ltd v Central Otago District Council* considered that the Environment Court erred by requiring a cost benefit analysis.[65] Moreover, it is inherently part of the evaluative function for the Environment Court to determine whether there has been adequate consideration of alternatives or whether the proposal is an efficient use of resources and whether there is a sufficient basis to draw a robust conclusion. In short, the assessment of efficiency and/or alternatives is essentially an assessment of fact, on the evidence, not readily amenable to appeal on a point of law.

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64 Cf *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 522.

65 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [116].

[133] Mr Somerville's submissions sought to distinguish leading authority eschewing the requirement to assess the viability of a project. The submissions also sought to distinguish the observations of the full High Court about cost benefit analysis in *Meridian*. I readily accept the proposition that the case law dealing with viability has nothing to do with cost benefit analysis. Viability is essentially concerned with profitability and the Courts in this context have never been concerned with profitability.[66]

[134] Cost benefit analysis is however concerned with quantifying, in economic terms, whether the costs of a proposed use of a resource exceed the benefits of that use. It is therefore a recognised method for assessing efficiency and/or the relative merits of alternatives, especially in circumstances where the ordinary operation of the market to achieve allocative efficiency cannot be assumed. But, as to the requirement to undertake a cost benefit analysis, the Court in *Meridian* observed:

> [111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a lesser means of decision making, the need for duly authorised decision-makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost-benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[135] I do not think this reasoning can be readily distinguished, as it is a general statement of principle about the functioning of the RMA. To that extent, it remains apposite to this case. However, unlike s 7(b), the Court under s 171(1)(b) must decide whether "adequate" consideration has been given to alternatives. It may be that a Court might find that the assessment was inadequate without a cost benefit assessment. But whether that is so is an evaluative matter for the Court and is not a mandatory requirement in every case.

[136] I have also reviewed the reasons given by the Environment Court in relation to cost benefit analysis, and I cannot identify any obvious flaw that might warrant

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66 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

further investigation by me or suggest a reviewable error of law. Quite the opposite, the Court assembled the information available to it, examined key considerations of operational efficiency and externalities, and formed a conclusion that was available to it on the evidence.[67] Accordingly, there being no general or specific duty at law to require a cost benefit analysis, this ground of appeal must fail.

Inconsistency of position

[137] Mr Somerville submits that QAC advised the Court that 8.07 ha was sufficient to enable it to undertake its operation, yet it has now sought to exercise powers of acquisition for 15 ha under the PWA. He says the Court relied on the QAC's representation in finally resolving that the modified position was appropriate. He therefore contends that had it known that in fact QAC needed more than 8.07 ha, the Court would have had to cancel the designation in its entirety, because it would not then have had a sound basis for the grant of a designation affecting that land.

[138] Mr Kirkpatrick responds that the PWA process was triggered to provide surety that, in the event that QAC was successful in this appeal, it could acquire the land it needed. He says there is no need to have the designation in place before commencing the PWA procedures. He also indicated that QAC would not seek to complete the PWA process without first having resolved the final scope of the designation.

Assessment

[139] I reject this ground. I do not accept that QAC represented to the Court that 8.07 ha was sufficient. I have the transcript of the relevant passage. I will not lengthen this judgment by quoting it. In short, Mr Kirkpatrick plainly indicated to the Court that compliance with Civil Aviation Authority standards might demand a greater amount of land to accommodate Code C aircraft. He simply confirmed that 8.07 ha was sufficient for general aviation and helicopter aircraft.[68] Accordingly there is no inconsistency of position.

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67 *Re Queenstown Airport Corporation Limited* [2012] NZEnvC 206 at [226], [235] and [236].
68 Transcript at pp 1419 and 1420.

The substation

[140] Question 12 deals with the inclusion of a substation within the designation. RPL is concerned to ensure that the substation is not affected by the designation, presumably as it is useful infrastructure. Mr Somerville submitted that the substation was beyond the designation boundary.

[141] Mr Kirkpatrick says that it is simply efficient to include the substation within the designation because of access issues. But there is no intention to affect its usual operation.

[142] I was not taken to the original designation to understand its areal extent. But assuming the substation was not contained within the literal boundary of the notified designation, Mr Kirkpatrick advises that there was a great deal of evidence about the substation, so plainly RPL had an opportunity to deal with any prejudice to it. Mr Kirkpatrick also advises that if the substation is relocated before any works are undertaken in respect of the designation, then it may be possible to re-align the boundary of the designation.

[143] To the extent therefore that there might be an issue arising out of the areal extent of the notified designation (which is not clear to me), I do not consider that a material issue of law arises warranting relief given the representations made by Counsel for QAC in its written submissions.[69]

Part D – Outcome

[144] I have identified the following errors (in summary):

(a) The Environment Court did not have regard to the potential disenabling effect of a maximum separation distance of 93m between the main runway strip and the taxiway;

(b) The Environment Court incorrectly excluded fairness as an irrelevant consideration;

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[69] See paragraphs 65-67 of outline of submissions on behalf of QAC in reply to RPL.

(c) The Environment Court did not correctly assess RPL's claims based on legitimate expectation;

(d) The Environment Court did not provide RPL with an opportunity to address the issue of scarcity of industrial land and its relevance or otherwise to the adequacy of the assessment of alternatives under s 171(1)(b).

[145] The first error, raised by QAC, is plainly material. If the Director of Civil Aviation does not approve the 93m separation distance, there may be insufficient land subject to the designation to enable both a Code C taxiway and a general aviation precinct. A key justification for the designation and its coercive effect over Lot 6 may then not eventuate. I cannot dismiss the prospect that the Court, properly apprised of this potentially disenabling effect, might allow more land to be subject to the designation or cancel the designation altogether rather than simply confirm the interim decision.

[146] The three remaining errors, raised by RPL, are interrelated. The central concern is that the Environment Court, by rejecting the relevance of fairness and RPL's asserted legitimate expectations, did not properly frame the alternatives or reasonableness assessment. The Court proceeded on the assumption that it could treat RPL's suggested alternative as suppositious even though the contractual background envisaged that QAC's land to the north might be used for aerodrome expansion, and while RPL's land to the south would remain a buffer zone. Yet there is at least an arguable case that RPL could legitimately expect that Lot 6 would remain a buffer zone, and/or alternatives not involving RPL's land would be thoroughly explored before the decision to designate was notified or confirmed. As a minimum RPL could expect that clear justification for using Lot 6 would be established prior to confirmation.

[147] One real difficulty for RPL is that the Environment Court has closely assessed the effects of the NOR in light of the criteria at s 171 and found clear justification for it. To the extent therefore that there has been any unfairness in the process leading up to the issuance of the NOR, it could be said to have been

remedied by the subsequent Environment Court process. The tipping point however is that the Court referred to scarcity of industrial land to disregard RPL's alternative. RPL was never afforded the opportunity to address the scarcity of industrial land and whether that provided a proper basis for the Court's conclusion. This was procedurally unfair and compounded the failure to have regard to RPL's asserted expectations. I cannot foreclose the possibility that the Court might be persuaded that scarcity of industrial land is not a valid issue, or if it is, that scarcity was and is not a proper reason to foreclose consideration of RPL's alternative, especially in light of the previous contractual arrangements.

[148] I therefore allow the appeals in part, and refer the application back to the Environment Court to reconsider:

(a) Whether the requirement should be cancelled or modified after it has provided the parties with an opportunity to be heard in relation to the separation requirements for a Code C taxiway and the process for confirming those requirements.

(b) The assessment of the adequacy of alternatives and reasonable necessity under s 171(1) (b) and (c) after it has provided the parties with an opportunity to be heard in relation to RPL's legitimate expectation claims and the scarcity of industrial land.

[149] Beyond these specific directions, it will be for the Environment Court to determine how it proceeds to reconsider the above matters and any consequential relief that might follow, if any, including but not limited to further modification or cancellation of the designation.

[150] I note that none of the parties have sought to challenge the findings about the improbability of a precision runway and Code D aircraft. Nothing in this judgment or the relief granted affects those findings or the substantive reduction in areal extent of the designation based on those findings.

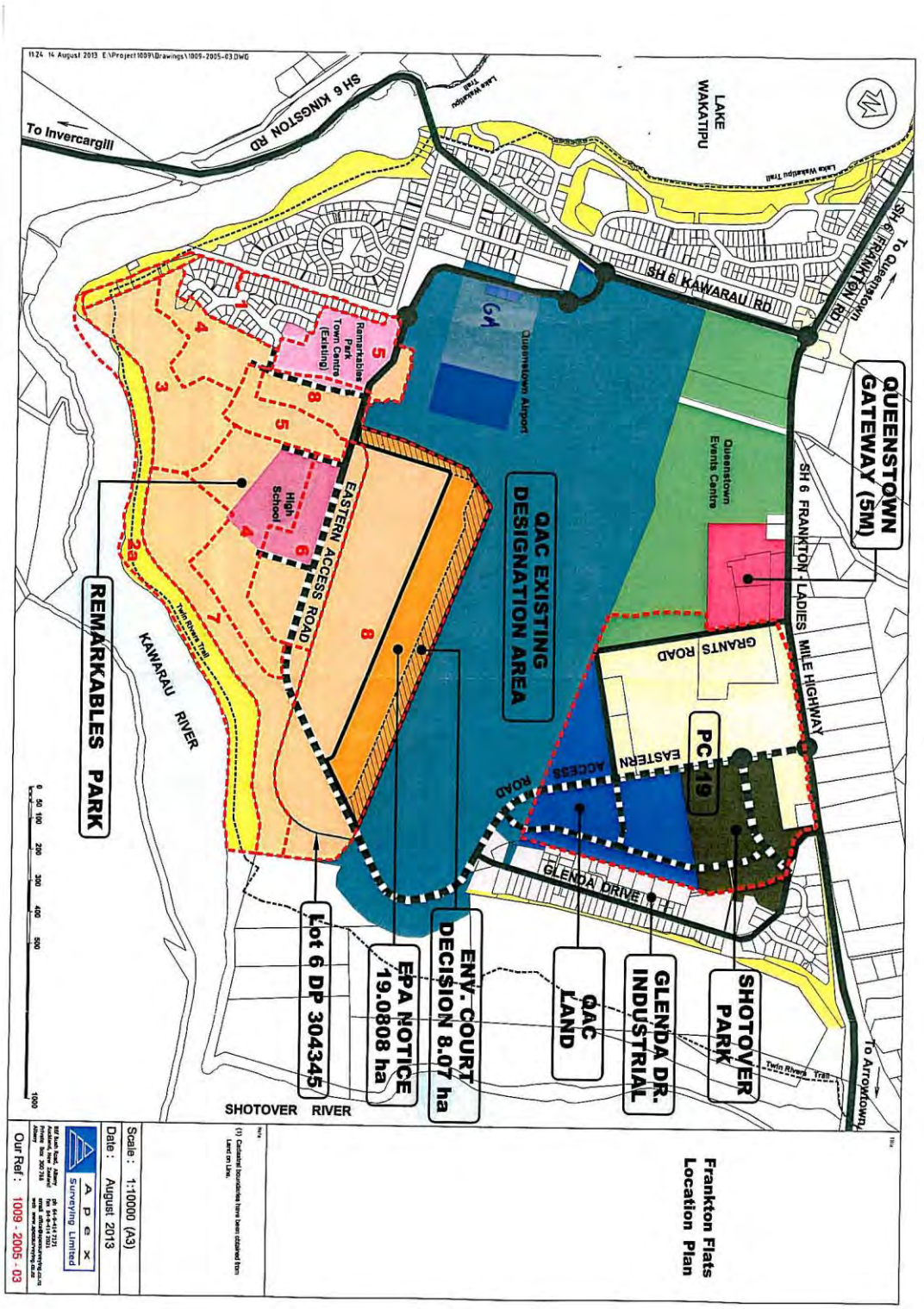
[151] Leave is granted to the parties to seek clarification of my orders if that is necessary. I will separately minute my availability in this regard.

Costs

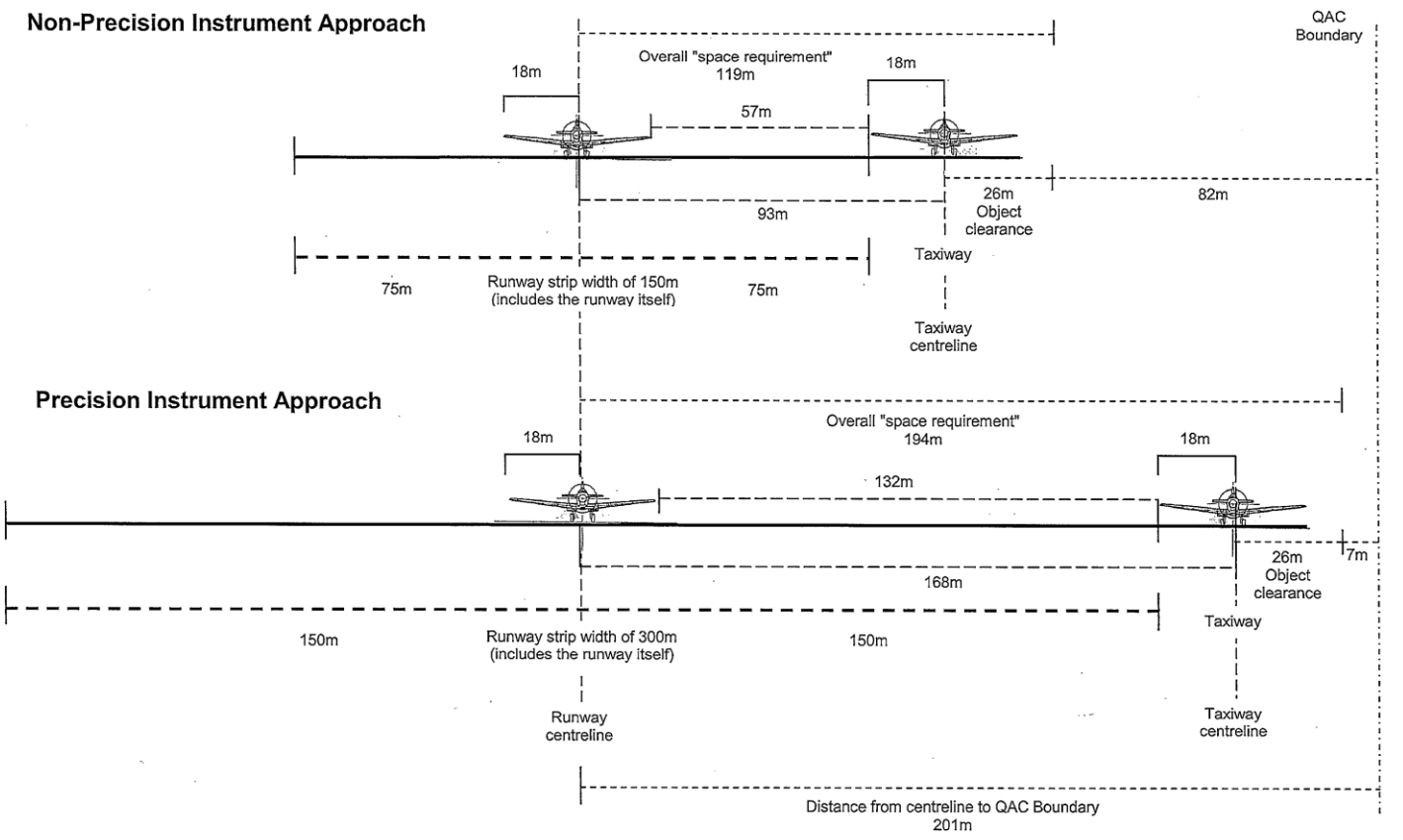
[152] Both appellants have had partial success on their appeals. I am minded therefore to let costs lie where they fall. If the parties do not agree they may file submissions, of no more than three pages in length.

Solicitors:
Brookfields, Auckland
Lane Neave, Christchurch
Russell McVeagh, Wellington

ANNEXURE A


QUEENSTOWN GATEWAY (5M)
SH 6 KINGSTON RD
To Invercargill
LAKE WAKATIPU
Lake Wakatipu Trail
SH 6 FRANKTON RD
To Queenstown
SH 6 KAWARAU RD
Queenstown Airport
Queenstown Events Centre
SH 6 FRANKTON LADIES MILE HIGHWAY
GRANTS ROAD
EASTERN ACCESS ROAD
PC 19
QAC EXISTING DESIGNATION AREA
Remarkables Park Town Centre (Existing)
High School
EASTERN ACCESS ROAD
REMARKABLES PARK
KAWARAU RIVER
Twin Rivers Trail
GLENDA DRIVE
SHOTOVER PARK
GLENDA DR. INDUSTRIAL
QAC LAND
ENV. COURT DECISION 8.07 ha
EPA NOTICE 19.0808 ha
Lot 6 DP 304345
SHOTOVER RIVER
To Arrowtown
Twin Rivers Trail
Frankton Flats Location Plan
Scale : 1:10000 (A3)
Date : August 2013
Our Ref : 1009 - 2005 - 03
Apex Surveying Limited

ANNEXURE B
SEPARATION DISTANCES FOR CODE C AIRCRAFT



2597650 v1

ORIGINAL

Decision No: C72/94

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for an enforcement order under section 316 of the Act

BETWEEN **G.T. AND A.P. BOANAS AND OTHERS**

Appeal : ENF 56/94

Applicants

AND **R.M. AND C.M. OLIVER AND OTHERS**

Respondents

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Skelton - (Sitting alone pursuant to section 309 of the Act)

HEARING at CHRISTCHURCH on the 25th day of July 1994

COUNSEL

Mr J.R. Milligan for the Applicants
Mr R.G.R. Eagles for the Respondents
Mr N.S. Marquet for the Queenstown Lakes District Council

DECISION

The applicants in these proceedings for an enforcement order own and occupy adjoining properties with frontage to Malaghan Road near Arrowtown.

THE SEAL OF THE PLANNING TRIBUNAL : NEW ZEALAND

In July 1992, the four respondents originally named, purchased an area of land containing approximately 20 hectares, also with frontage to Malaghan Road, and in reasonably close proximity to the applicants' properties. This purchase was conditional upon a subdivision consent being obtained to enable the land being purchased to be surveyed out of a larger block.

One of the respondents, Mr R.M. Oliver, has been involved with the Southland Hanggliding Club since it first commenced flights in the Queenstown/Arrowtown area some 20 years ago, and in evidence he told me that the area around Coronet Peak, which provides a backdrop to the properties involved in these proceedings contains perhaps the best soaring and thermal qualities in New Zealand for hanggliding and paragliding, which together with microlight aircraft flying have been recognised as having considerable tourist potential. The respondents purchased their property for the purpose of operating hanggliders and microlight aircraft.

From the outset, the respondents were anxious to ensure that their proposal complied with the relevant provisions of the district Plan and on more than one occasion they had discussions about this with the district planning officer for the Queenstown Lakes District Council. They were assured on each occasion that what they proposed was a permitted activity and there would be no problems.

When the application for subdivision consent was lodged with the Queenstown Lakes District Council specific reference was made to the respondents' purpose as being to establish a hanggliding and parapenting or paragliding business and that it was proposed to store equipment on the property for that purpose. It was noted too that in the Rural B zone - the relevant zone for present purposes in the district Plan - landing and takeoff strips for aircraft were a "predominant use".

The subdivision consent was duly granted in August 1992, but no reference was made to the respondents' proposed activities. Again, in an effort to be sure that these activities met the requirements of the district Plan, the respondents had a further meeting with the district planner and were again given an assurance that there was no legal impediment to operating their property as a flight park which is a generic term covering all the activities as earlier described.

I add at this point that the legal description of the respondents' property is all that parcel of land containing 20.0110 ha more or less being Lot 1 on Deposited Plan 22979 and being part section 15 Block XVII Shotover Survey District and all the land in Certificate of Title Volume 15B Folio 159 (Otago Registry).

In January 1993, the noise officer with the Queenstown Lakes District Council received complaints about horses being frightened by the noise of the microlight aircraft from persons occupying properties to the south-east of the respondents' property. Again, the respondents were advised that, after looking at the relevant provisions of the district Plan and the Civil Aviation Regulations, their activities were lawful and no further action was taken.

Since purchasing the property and establishing their business on it, the respondents have used it for training members of the public to fly microlight aircraft and hanggliders. In fact, this particular activity is undertaken by a company known as 'Southern Airborne Queenstown Limited', in which, as I understand it, the respondents are shareholders, and at the hearing and by consent this company was added as a respondent. The property is also used for a fee, by private microlighters and hanggliders to land on and take off from, and there is a paragliding or parapenting business called 'Max's Air Company Limited' which, on a commercial basis, also uses the property for takeoffs and landings. Just to the east of the respondents' property there is another landing strip on land owned by one Ian McAuley that is also used by several other operators.

Although the respondents purchased their property in July 1992, they did not become the registered proprietors of that land until August 1993. I do not know the reason for this. It may have been something to do with the subdivision, but in any event it was about that time that the applicants say they became aware of the nature of the respondents' business. Prior to that, the respondents land had been used occasionally by microlight aircraft but the applicants were not aware of the basis upon which that was occurring. About August 1993, a sign appeared at the road boundary of the respondents' property that reads:

"Flight Park
Flying
Open"

Since then, it has become apparent to the applicants that the property is being used as a commercial airfield for the landing and takeoff of microlight aircraft and for the launching of hanggliders. The latter is achieved by the use of a high speed winch system driven by a petrol engine that catapults hanggliders into the air. Flying occurs predominantly in the summer, and when wind speeds are comparatively low. The applicants complain that in these conditions noise from the microlight aircraft is very intrusive.

Rule 7.01 in the Transitional District Plan purports to prescribe the following as a permitted activity:

> "(b) Landing and takeoff strips for Category 8 aircraft providing public and private transport subject to the approval of the Council."

Again in evidence before me, a former Queenstown Lakes District Council planner, Mr M.J.G. Garland, said that the words "...for Category 8 aircraft" were inserted into the Rule in 1987 by way of Change 63. This Change was promoted at the time when a resort development at Walter Peak appeared to be a definite proposal, and the Council was concerned that the Rule as it then stood might allow larger commercial aircraft such as Hawker Siddley 748 aircraft operated by the Mt Cook Group to land at Walter Peak as of right.

I also learnt at the hearing that, strictly speaking, the term "Category 8 aircraft" is erroneous. Apparently there are some Civil Aviation guidelines that do not have the force of regulations but which provide or used to provide for airstrips for aircraft below 3,600 kilograms weight to be classed as Category 8 airstrips. It seems this categorisation no longer applies. Be that as it may, that is the explanation for the inclusion of that phrase in the Rule and it became common ground at the hearing that it creates difficulties with the permitted activity prescription for the reasons just stated.

The words " ... subject to the approval of the Council" which have always formed part of the prescription were "re-enacted" as it were by Change 63, the procedure for which was to delete the entire rule and replace it with a new rule so as to include the words "for Category 8 aircraft".

Thus as Mr Garland observed, no attempt was made by the Council to remove or alter the words "...subject to the approval of the Council," notwithstanding that by 1987 as a result of cases such as **Ruddlesden -v- Kapiti Borough Council** 11 NZTPA 301 it was well established that such a discretion could not be reserved in the prescription for a use permitted as of right.

Nevertheless, because of the view that the Council took about this matter, Mr Garland, while recognising the difficulties, felt it incumbent upon him to continue to advise people such as the respondents, that he could not require them to make any application for any form of resource consent.

The Rule I have just been discussing has been referred to, in passing, in at least one decision of the Tribunal to which reference was made at the hearing, namely **Danes Shotover Rafts Limited -v- Queenstown Lakes District Council** Decision No: A55/93. That was a case involving an application for a resource consent to establish a helipad at Gorge Road, Arthurs Point on land zoned Tourist Development 2. In the course of its decision the Tribunal recorded, without comment, that helipads were a predominant use in the Rural B zone. On page 4 of the decision it also referred to certain objectives contained in the district Plan for the development and operation of air transportation services within the district. On the same page it again referred specifically to the Rural B zone as being a zone "where landing and take-off strips for category 8 aircraft are predominant uses...". It then went on to say that the absence of any provision for helipads in the Tourist Development 2 zone was not explained in the district Plan.

It appears from this decision that the argument I heard in the present case about Rule 7.01(b) was not presented to the Tribunal in the **Danes Shotover Raft Limited** case, even though Mr Marquet was counsel appearing for the Council in both cases.

Be that as it may, the Tribunal's reference in **Danes Shotover Raft Limited** to the relevant objectives is of some assistance because at page 34 of the district Plan reference is made to private strips being used by agricultural contractors and deer recovery operators, and reference is also made in the context of future helicopter facilities, to applications for approval being needed to be made from time to time as the role of the helicopter develops. This, so it seems to me, helps to explain why Rule 7.01(b) contains the words "...subject to the approval of the Council." There is no specific objective or policy for the Rural B zone that explains the existence of the Rule.

In essence it is the applicants' case that Rule 7.01(b) is invalid either because it is uncertain or because it is ultra vires, or both, and consequently the respondents require a resource consent to continue the land use activities known generically as a flight park. In the end, neither Mr Marquet nor Mr Eagles felt able to argue to the contrary, and consequently for the purposes of determining this application, I am now in a position where it is really common ground that Rule 7.01(b) is to be struck down because it is invalid.

For this reason it is not necessary for me to refer to the extensive arguments of counsel, and in particular those put forward by Mr Milligan, but there is one area of disagreement between him and Mr Marquet to which I should refer. Before doing that I should add at this point that the principal reasons for counsels' agreement that Rule 7.01(b) is invalid, with which I agree, are that the phrase "category 8 aircraft" if it ever did have a meaning, no longer has any meaning at all, and the reservation "...subject to the approval of the Council" is invalid for the reasons set out in **Ruddlesden's** case, amongst others. It is also accepted that none of the offending provisions can be legitimately severed, because to do so would create a Rule that is different from the one contemplated by the relevant provisions of the district Plan. For a recent discussion about severance, see the judgment of McGechan J. in **McLeod Holdings Limited**-v- **Countdown Properties Limited** 14 NZTPA 362 and the other judgments and decisions referred to by the learned Judge in that case.

In the course of his submissions, Mr Marquet submitted that because Rule 7.01(b) would almost certainly have been held to be invalid under the Town and Country Planning Act 1977, it could not be deemed to be a valid

provision of the transitional district Plan, in terms of sections 373 and 374 of the Act. For his part Mr Milligan was prepared to submit that even though it reserves a discretion, and in particular a discretion to grant approval, it might in effect be validated by section 374(3)(b) of the Act, whereby a provision of a district Plan that expressly or by implication:

> "(b) Authorised anything if the consent or approval of the former consent authority was obtained, is deemed to be a district rule in respect of a discretionary activity; ..."

Mr Milligan was, of course, content to accept that this is the position because if Rule 7.01(b) was held to be "saved" in that way, the respondents would still require a resource consent and that is all that he has to establish in order to make out his case for an enforcement order.

Because counsel are agreed that Rule 7.01(b) is invalid, I do not need to decide whether either Mr Marquet or Mr Milligan is right, and I prefer to do no more than indicate as I did at the hearing, that I think the validity of a provision in a deemed district Plan should be determined by reference to the provisions of the present Act. In the end I understood Mr Marquet to agree with this proposition.

In any event because the words "for category 8 aircraft" would still be in Rule 7.01(b) and it is agreed those words cannot be severed, the rule would be void for uncertainty anyway.

Having reached this point I can now come to the principal issue, namely whether I should make an enforcement order(s) at all, and if so, on what terms. This raises the most difficult point in the whole case because I am quite satisfied that at all material times the respondents have acted in the genuine belief that what they have been doing is lawful. Indeed, in my experience, they have gone to extraordinary lengths to satisfy themselves about that. At one stage they even took independent legal advice, which was to the same effect. However, Mr Milligan has urged upon me that I should make an order or orders, now.

The contravention of the Act in this case is the use of land in a manner that contravenes a rule in a district Plan without being expressly allowed by a

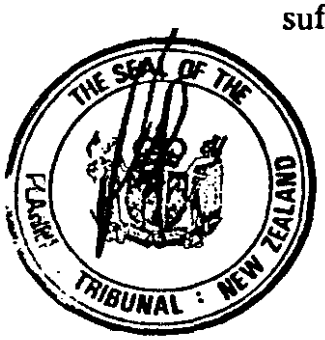
resource consent - see section 9. The rule that is contravened is, of course, the deemed rule created by section 374(3)(c) of the Act that deems the activities generically described as a flight park to be non-complying - see **Kawarau Jet Services Limited** -v- **Projet Adventures Limited** 1 NZRMA 1. There were no arguments to the contrary in this case.

Although the applicants want me to make orders now, they are prepared to have their effect deferred for a period of time to enable the respondents to apply for a resource consent which, through Mr Oliver, they have undertaken to do. The applicants take the view however, and there is some force in this, that they should not have to return to me or to the Tribunal for any further relief, in the event that the application for a resource consent is not made or does not proceed, or indeed is refused.

The respondents rely heavily on the history of this matter for a submission made through their counsel, Mr Eagles, that no orders should be made immediately and that I should adjourn these proceedings for a period of time to enable the respondents to apply for the necessary resource consent. To do otherwise, so it is submitted, would be to penalise the respondents for a flaw in the district Plan. Reference was made to **Australian Mutual Provident Society and Others** -v- **Gum Sarn Property Limited** 2 NZRMA 119.

There have now been several cases where the Tribunal or Planning Judges sitting alone have, for various reasons, either delayed making an enforcement order or deferred the coming into force of an enforcement order, or have made an enforcement order leaving it to the respondent to take steps to have it changed or cancelled at a later time if the appropriate circumstances arise.

In the **Australian Mutual Provident Society** case there was a lengthy discussion about the nature and the exercise of the residual discretion that exists when dealing with applications of this kind, and in the end for the reasons given the Tribunal decided to make a variety of orders. I notice incidentally that no distinction was made between the provisions of section 314(1)(a)(i) and 314(1)(b)(i), and that the Tribunal had no difficulty in ordering a respondent in an appropriate case to cease permitting, allowing or suffering certain unlawful activities on property of which it was the lessee.



However, in the instances where time was given, this was done really on the basis suggested here by Mr Milligan, namely a period of grace before the orders to cease were to come into effect. I notice also that, in those instances, the orders were to continue to be effective until the specified activities were authorised pursuant to the district plan or a resource consent.

In Rangiora New World -v- Barry 1 NZRMA 133, I decided to order the respondent to cease an unlawful retailing activity but I also postponed that order for a period of some two days to enable the respondent to dispose of perishable goods. In Queenstown Bungy Centre Limited and Another -v- Hensman and Others Decision No: C7/94, the Tribunal ordered the respondents to cease an unlawful activity until they had lodged an application for a resource consent. It also ordered that the order to cease would come back into force if that application was either withdrawn or refused.

However, more recently in Christchurch City Council -v- Ivory and Others Decision No: C60/94, I decided to defer making an enforcement order to enable the respondents to apply for a change to an existing resource consent. At page 14 of that decision I said this:

> "Making an enforcement order is a serious step to take because if it is breached an offence is committed, and I am reluctant to put the respondents in that position if they will now agree to make the necessary application to accommodate the changes in their development. This too is really what the Council is seeking. If the respondents now agree, then I am prepared to defer making an enforcement order for a period of three months to enable them to do that. They will have one week from the date of this decision in which to advise the Council and myself, through the Registrar, whether they now agree. If, at the expiration of that time, I do not have their agreement, then I intend to make an order requiring them to cease construction. I await their advice, accordingly."

I then reserved leave for either party to apply for further directions, and if I was not required to make an order the proceedings were to stand adjourned for three months, again with leave reserved to either party to apply. As it turned out, the respondents did agree to make the necessary application for a

change to the resource consent and the proceedings currently stand adjourned sine die, accordingly.

In that case, I also referred to the Tribunal's decision in **Christchurch City Council -v- Aranui Estates Limited** Decision No: C23/93. There the Tribunal also decided to defer making an enforcement order requiring the respondent to cease an existing activity in order to give it time to apply for a resource consent. This was done because the respondent had been misled by earlier advice from the Council about whether consent was required at all for the activity that was the subject of that part of the Tribunal's decision in that case.

In both the cases just referred to, the **Aranui Estates Limited** case, and the **Ivory** case, the applicant for the enforcement orders was the local authority. If that had been the case here, I would have acceded to Mr Eagles request. I am in no doubt that the Queenstown Lakes District Council and/or its officers have led the respondents into a false sense of security. Consequently, in the exercise of my residual discretion I would not have regarded it as being necessary in the public interest, nor indeed in any way fair to the respondents, to have given the local authority immediate relief, even though I accept, as was pointed out in the **Australian Mutual Provident Society** case, that a local authority has a duty to enforce its district plan. In this case, having regard to the history of this matter, perhaps the less I say about that duty, the better. It is to be hoped that the Queenstown Lakes District Council will now do something quite quickly to correct what ought to have been seen years ago as being a fundamental defect in its district Plan.

But in this case, the local authority is not the applicant for the orders. Indeed Mr Marquet made it quite clear that it is neutral as to whether orders should or should not be made. Here, the applicants for the orders are private citizens seeking to protect their own properties from the consequences of what is now conceded to be an unlawful activity, and in those circumstances I think Mr Milligan is right in urging me to make orders now.

To assist the respondents I intend making an order along the same lines as the one in the **Queenstown Bungy Centre** case, except that in this case my intention is that the order is to be final in the sense that this application is now to be finally determined. Consequently, if any person affected by the

order wishes to have it changed, it will be necessary for an application to be made under section 321 of the Act.

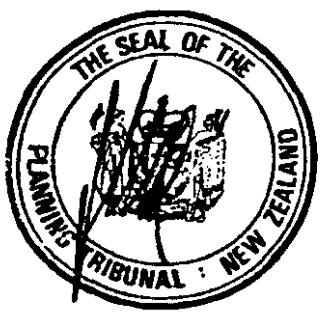
In the result therefore, I now make the following determinations:

1. The application for an enforcement order by Guy Thomas Boanas, Anne Pamela Boanas, Albert Narinus Borren and Finella-Lee Borren Matthews, as amended at the hearing to include an order under section 314(1)(b)(i) of the Act if necessary, and to include Southern Airborne Queenstown Limited as a respondent, is granted and the following order is made:

   Pursuant to sections 314(1)(a)(i), (1)(b)(i) and (3) of the Resource Management Act 1991 ROBERT McAULLEY OLIVER, CHRISTINE MARY OLIVER, BRYAN WILLIAM FRAME, DAVID CHARLES ARTHUR and SOUTHERN AIRBORNE QUEENSTOWN LIMITED are Hereby Ordered to cease forthwith using or allowing to be used the land situated at Malaghan Road, near Arrowtown, and more particularly described as containing 20.0110 hectares more or less being Lot 1 on Deposited Plan 22979 and being part Section 15 Block XVII Shotover Survey District, and all the land in Certificate of Title Volume 15B Folio 159 (Otago Registry), for the purposes of a flight park including the landing and takeoff of aircraft (including microlight aircraft and hanggliders, whether powered or not) until they have lodged or have caused to be lodged with the Queenstown Lakes District Council an application for a resource consent for the aforementioned land use activity.

   Pursuant to section 314(5) of the Act this order is to apply to the personal representatives, successors and assigns of the said ROBERT McAULLEY OLIVER, CHRISTINE MARY OLIVER, BRYAN WILLIAM FRAME, DAVID CHARLES ARTHUR and SOUTHERN AIRBORNE QUENSTOWN LIMITED to the same extent as it applies to them.

   This order shall cease to have effect when the aforementioned application for a resource consent has been lodged with the



Queenstown Lakes District Council PROVIDED THAT if that application is either withdrawn or refused by the Queenstown Lakes District Council, this order shall thereupon again come into full force and effect.

2. All questions of costs are reserved. Any applications for costs are to be lodged with the Registrar's office at Christchurch within twenty-one (21) days of today's date. Any replies are to be lodged within twenty-one (21) days thereafter.

DATED at CHRISTCHURCH this **28th** day of **July** 1994.

R.R. Skelton
Planning Judge

Bryant Holdings v Marlborough District Council

High Court Blenheim CRI 2008-406-3
22 April, 16 June 2008
Clifford J

District plan rules — Permitted activity — Attempt charge — Prosecution — Sentence — Whether ultra vires — Condition of notification — Condition on permitted activity requiring subjective assessment — Collateral challenge to vires of rule within prosecution — Resource Management Act 1991, ss 9, 14, 83, 338(1); Crimes Act 1961, ss 72, 311.

T L & N L Bryant Holdings Ltd (the appellant) built a stopbank on its land along 450 m of the bank of the Pelorus River without obtaining the necessary resource consent. The district plan prevented the excavation or filling of land within the riparian management zones specified in the plan. The damming or diversion of water for flood control purposes was a permitted activity in the plan on the proviso that the Marlborough District Council (the council) was notified of the intended activity in writing at least ten days prior to the commencement of any work and the work did not adversely affect any other land. The appellant had failed to provide the requisite notice and was duly prosecuted by the council and convicted on both counts. In respect of the diversion of water, the appellant was convicted of an attempt because retrospective resource consent had been obtained prior to any actual diversion. The District Court imposed fines totalling $20,000. The appellant sought to appeal against the convictions and sentence for the following reasons: the rule requiring notification to the council in respect of a permitted activity was ultra vires; the District Court was incorrect in preventing the ultra vires point from being raised in a prosecution; the Resource Management Act 1991 did not provide for attempt offences; the appellant's actions did not, as a matter of law, constitute an attempt to divert water; notwithstanding its acceptance of the fact before the District Court, the land was not in a riparian management zone; and the sentences were manifestly excessive.

Held (allowing the appeal in part and referring the matter back to the District Court)

1 There appeared to be a prima facie case that the land, whether by mistake or otherwise, was not shown as falling within the riparian management zone on the relevant map of the district plan.

Notwithstanding the fact that the matter had been conceded in the District Court, the matter should be remitted to that Court for rehearing. The Court was mindful of the fact that the appellant had been convicted of a criminal offence and it was in the interests of justice for the matter to be reconsidered (see para [40]).

2 The conditions requiring that notice be given to the council and that the work did not affect any other land did not reserve a discretion to or require a subjective assessment by the council and thus were vires. Notice simply enabled the council to ensure that the work being carried out fell within the parameter of the permitted activity and the "effects condition" was not "too uncertain" (see paras [48], [49], [50]).

3 Convictions for an attempt are available in prosecutions under the Resource Management Act 1991 by virtue of s 72 of the Crimes Act 1961. On the facts of the case no question of impossibility, legal or otherwise, arises and as the actions of the appellants were more than preparatory, they constituted the actus reus of an attempt to divert the Pelorus River. However, even where an attempt is to commit a strict liability offence, it is necessary for the prosecution to establish intent beyond reasonable doubt. On the present facts, the Court cannot be satisfied that mens rea was satisfactorily established and thus, this matter should be addressed at the rehearing (see paras [70], [71], [72], [73], [74], [81], [85]).

4 The appellants did not establish that the sentences were manifestly excessive; however, the District Court should note that s 311 of the Crimes Act 1961 provides that where there is an attempt the maximum penalty is one-half of the maximum penalty that would apply to the substantive offence (see paras [87], [88]).

Observation

There is a right under the rule of law to defend proceedings by a collateral challenge to subordinate legislation unless that right is displaced by clear parliamentary intention to the contrary. The Resource Management Act 1991, by virtue of ss 9, 14, 76(2) and 83, appears to evince that intention. The Court was hesitant to conclude however that there will never be any circumstances in which a collateral challenge would be available to a prosecution under the Resource Management Act 1991 (see paras [55], [56], [62].)

Brader v Ministry of Transport [1981] 1 NZLR 73 (CA) applied.

Brady v Northland Regional Council (High Court, Whangarei AP 25/95, 25 October 1996, Elias J) applied.

Smith v Auckland City Council [1996] NZRMA 27; [1996] 1 NZLR 634 (HC), [1996] NZRMA 276 (CA) considered.

Other cases mentioned in judgment

Austin, Nichols & Co Inc v Stichting Lodestar [2008] 2 NZLR 141; (2007) 18 PRNZ 768 (SCNZ).

Boddington v British Transport Police [1998] 2 All ER 203; [1999] 2 AC 143.

Friends of Pelorus Estuary v Marlborough District Council (Environment Court, Blenheim C 4/08, 24 January 2008, Judge Sheppard).

Harwood v Thames Coromandel District Council (High Court, Hamilton A52/02, 10 March 2003, Randerson J).
Northland Regional Council v United Carriers Ltd (District Court, Whangarei CRN 04088500926 & others, 12 October 2005, Judge Newhook).
Police v Wylie [1976] 2 NZLR 167 (CA).
R v B (No 5) (High Court, Christchurch T 19/01 3 September 2001, William Young J).
R v Burrett (No 2) (High Court, Wellington T 3347/02 13 February 2003, Hammond J).
R v Donnelly [1970] NZLR 980 (CA).
R v Percy Dalton (London) Ltd (1949) 33 Cr App R 102.
R v Wicks [1997] 2 All ER 801; [1998] AC 92.
R v Yen [2007] NZCA 203.
Southland Regional Council v Hokura Co Ltd (District Court, Invercargill CRN 1025007486 & others, 21 November 2001, Judge Thompson).

Appeal
This was an appeal against conviction and sentence in respect of a contravention of a district plan.

D J Clarke for the appellant.
P J and *M J Radich* for the respondent.

CLIFFORD J.
Introduction
[1] In November 2006, the appellant company, T L & N L Bryant Holdings Ltd (Bryant Holdings), built a stopbank — on land it owns and farms (the land) — along some 450 m of the south bank of the Pelorus River. It did so without first obtaining a resource consent.
[2] An adjoining landowner complained to the local authority, the Marlborough District Council (the council). The council investigated matters and issued an abatement notice. Bryant Holdings then applied for, and was granted, a retrospective resource consent for the stopbank.
[3] The council subsequently charged the appellant, pursuant to s 338(1) of the Resource Management Act 1991 (the RMA), with a contravention of s 9 and an attempted contravention of s 14 of that Act. In the District Court at Blenheim on 25 January this year Judge Thompson convicted and fined the appellant $10,000 on each charge.
[4] Bryant Holdings now appeals against conviction and sentence as regards both charges.

The charges
[5] The council is a unitary authority. Accordingly, it has jurisdiction in respect both of land use in and of itself (s 31 of the RMA) and land use as it affects water (s 30 of the RMA).
[6] As is well known, the use of land and of water are dealt with differently under the RMA. Under s 9, the regime as regards the use of land is permissive. Land may be used in any manner unless its use is restricted by a rule in a district plan or proposed district plan. Under s 14,

the regime as regards the use of water is restrictive. Water cannot be taken, used, dammed or diverted unless, in general terms, that action is allowed by a rule in a regional plan or in a relevant proposed regional plan, or by a resource consent.

[7] As regards relevant controls on the use of land, rule 36.1.5.3 of the Marlborough Sounds Resource Management Plan (the district plan) deals with excavation and filling. Rule 36.1.5.3.6 provides as follows:

> 36.1.5.3.6 Riparian areas.
>
> Except for direct approaches to bridges, crossings and fords; maintenance of rail and public roads; and trenching for cable laying, no excavation or filling must take place within riparian management zones as specified in the schedule of water bodies in Appendix I and as mapped in Ecology Maps in Volume Three, or in a manner or location where the General Conditions for Land and Disturbance cannot be complied with.

[8] Therefore, to place fill on land in a riparian management zone, or in a manner or location where the general conditions for land disturbance could not be complied with, required a resource consent.

[9] As regards relevant controls affecting the use of water, the district plan provides that damming or diversion for flood control purposes was a permitted activity, subject to a number of conditions. Those conditions include notification to the council in writing at least 10 working days prior to the commencement of any work. These provisions are contained in cl 26.1.3.2 of the district plan.

[10] It can therefore be seen that:

(a) building a stopbank in a riparian management zone required, in terms of the district plan's restrictions on land use and the placing of fill on land, a resource consent; whereas

(b) to the extent that it constituted a diversion of water, building a stopbank was a permitted activity in terms of the district plan's restrictions on the use of water, subject to compliance with certain conditions, including as to notification.

[11] Bryant Holdings was charged with respect to s 9 on the basis that the construction of the stopbank constituted filling within a riparian management zone without a resource consent, in breach of the prohibition in rule 36.1.5.3.6.

[12] Bryant Holdings was charged with respect to s 14 on the basis that, as it had not given notice, rule 26.1.3.2 did not apply. Therefore, without being expressly allowed to do so by a rule in the district plan and without a resource consent, it had attempted to divert flood waters within the flood plain of the Pelorus River by constructing the stopbank. The attempt charge was laid because Bryant Holdings obtained its retrospective resource consent before, in fact, the Pelorus River was diverted by the stopbank it had built.

The District Court decision

[13] At the hearing of the charges in the District Court, and on the basis of the Judge's decision, Bryant Holdings' defence would appear to have been advanced on the basis that the two rules (26.1.3.2 and 36.1.5.3.6) were in conflict, and that two of the conditions in rule 26.1.3.2.1 were ultra vires the RMA.

[14] The Judge first concluded that, on a prima facie basis, the charges had been made out. He did so at para [9] in the following terms:

> On the face of it then, it seems to be clear enough that in terms of the land use prosecution alleging a breach of s 9 that the stopbank was constructed, and that no resource consent existed to authorise it. Similarly, the whole purpose of a stopbank is to divert floodwater, and that is what occurred here. The charge under s 14 is also prima facie made out.

[15] He then went on to consider the arguments raised by Mr Clark for Bryant Holdings.

[16] He concluded that the two rules were not "in conflict", addressing as they did separate issues as regards land use and the diversion of water. As regards the former, the unchallenged evidence was that the land was in a riparian management zone, and therefore rule 36.1.5.3.6 applied.

[17] The Judge then considered Mr Clark's challenge to the conditions found in rule 26.1.3.2.1, on the basis that they were ultra vires. That rule provides as follows:

> **26.1.3.2.1 Conditions**
>
> (a) The Council is to be notified in writing at least 10 working days prior to the commencement of any work. The notifications shall give notice of:
> — The location of the works;
> — A description of the works;
> — The date of commencement of works; and
> — An estimation of the duration of the damming or diversion.
> (b) That any diversion shall be limited to that contained within the existing flood channel of any watercourse.
> (c) That any damming or diversion of water shall not have any adverse effect on any flora or fauna or recreational values.
> (d) That no person shall dam any river or stream or divert any water so as to adversely affect any land owned or occupied by another person.

[18] The defence argued that the condition in rule 26.1.3.2.1(a) constituted an unlawful restriction on what was otherwise a permitted activity. That argument was based on s 77B(1) of the RMA, which provides as follows:

> If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

[19] The defence's argument was that "conditions" could only relate to the activity itself, and could not — as Mr Clark put it — involve some pre-activity notification.

[20] The Judge did not agree with that proposition. He concluded that notification could be regarded as part of the activity. He thought it easily understandable why a council would wish to have that notification in such a sensitive area.

[21] The Judge recorded that Mr Clark had argued further that the condition in rule 26.1.3.2.1(d) required a subjective assessment that was at odds with rules about permitted activities.

[22] The Judge noted that while there might be some argument about that issue, the very recent decision of *Friends of Pelorus Estuary v Marlborough District Council* (Environment Court, Blenheim C 4/08, 24 January 2008, Judge Sheppard) indicated that the "prohibition" on some sort of assessment was not as absolute as that. Judge Thompson concluded at para [16]:

> Within reason, an assessment can be made by a regulatory authority and decisions made about it. Such assessments may involve some form of evaluation and in this case I would have thought that was straightforward enough.

[23] In any event, the Judge was of the view that the issue of ultra vires was not one that could be raised in a prosecution context. In that, he relied on the decision of the High Court in *Smith v Auckland City Council* [1996] NZRMA 27, as confirmed by the Court of Appeal (see [1996] NZRMA 276).

[24] On the basis that it was plain to him that the conditions in rule 26.1.3.2.1 had not been complied with, and that it was equally plain that the land was in a riparian management zone to which the prohibition on excavation or filling in rule 36.1.5.3.6 applied, the Judge entered convictions on both charges.

[25] In a separate sentencing memorandum (sentences being imposed immediately after the entry of convictions), the Judge concluded that a penalty in the overall range of $20,000 was called for, particularly to recognise the need for deterrence. He divided that amount equally between the two charges.

Grounds of appeal

[26] In its written notice of appeal the appellant asserted that the Judge:

(a) erred in law in finding that the issue of ultra vires could not be raised in the context of a prosecution;
(b) misinterpreted rule 36.1.5.3.6;
(c) erred in finding that conditions (a) and (d) to rule 26.1.3.2 were to be regarded as lawful; and
(d) erred on the basis that the sentences imposed were manifestly excessive.

[27] In its written submissions, the appellant considerably shifted the grounds of its appeal. It added two new grounds of appeal. First, it challenged the conviction under s 14 on the basis that the RMA did not provide for attempt offences, and that there had not been any actual diversion of the Pelorus River prior to the appellant obtaining its resource consent. There had therefore been no breach of s 14. Secondly, as regards s 9 it asserted that, notwithstanding its acceptance of this matter in the District Court, the land was not in fact in a riparian management zone. Furthermore, the appellant had not breached the general conditions for land disturbance.

[28] At the hearing, the appellant changed the grounds of its appeal again.

[29] Having considered the respondent's submissions in reply on the question of attempts, it was apparent the appellant realised that s 72 of the Crimes Act did apply to offences under the RMA. At the hearing, therefore, it argued instead that what the appellant had done did not, as a matter of law, constitute an attempt to commit the offence of diverting water without a resource consent.

[30] As the respondent submitted, the way in which this appeal was argued, relative to the way in which the charges were defended and the notice of appeal was expressed, is less than satisfactory. The respondent objected, in particular, to what it submitted was the appellant's attempt to re-argue factual matters — in particular, whether the land was or was not within a riparian management zone, something that had been conceded at trial. I will consider those issues, as well as the substantive points raised by the appellant, in analysing each of the points on appeal.

Approach to this appeal

[31] Appeals under the Summary Proceedings Act are general appeals by way of rehearing. The traditional approach has been that the appellant bears the onus of satisfying the Court that it should differ from the original decision, and any weight given by the appellate Court to the original decision is a matter of judgment.

[32] The approach has been discussed and modified by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. The Supreme Court said at para [16]:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[33] I approach this appeal accordingly, noting here that the appellant has largely based its appeals on matters of law, together with – on the issue of whether the Land is in a riparian management zone – an

issue which is a mixed question of law (the classification in the district plan of riparian management zones) and of fact (the actual location of the land relative to that classification).

Discussion

[34] I will consider the issues raised by this appeal first as regards the conviction entered with respect to s 9, and then as regards the conviction with respect to s 14. I will then address the appellant's challenge to the sentences imposed.

Section 9 — Was the land located in a riparian management zone

[35] Mr Clark correctly and properly acknowledged that the appellant had conceded, during the District Court hearing, that the land was located within a riparian management zone. Notwithstanding that concession, in his written submissions on appeal Mr Clark challenged that proposition. He argued that riparian management zones were, in terms of rule 36.1.5.3.6, areas of land as "specified in the schedule of water bodies in Appendix 1 and as mapped in the Ecology Maps in Volume Three". Mr Clark's submission was that the Volume Three maps demonstrated that the land did not fall within a riparian management zone. The riparian management zone, in his submission, appeared to protect the old river bed, which was now a tributary of the Pelorus River. The riparian management zone did not cover that part of the Pelorus River, which was a deviation from its old river bed, that ran through the Land.

[36] Mr Clark endeavoured to establish that proposition by providing to me what I understood from him was an enlargement of one of the Volume Three maps, and by referring me to an aerial photograph of the general area, which was produced as an exhibit by the council's witness at the hearing. By comparing the two, Mr Clark submitted that the Land was not in a riparian management zone and that I should allow the appeal on that basis.

[37] In response to Mr Radich's submission that this matter had been conceded during the District Court hearing, and that it was now too late to raise what was essentially an evidential point, Mr Clark submitted that this was in fact a question of law.

[38] I have considerable sympathy for Mr Radich's proposition that, having conceded the issue at the District Court hearing, it is now too late for Mr Clark to raise this issue. Having said that, however, on the basis of the material put before me – albeit I note on a somewhat unsatisfactory basis – it would appear to be clearly arguable that, by mistake or otherwise, the land is not shown in the relevant Volume Three map as forming part of a riparian management zone. On that basis, there may be an argument that, in terms of the district plan, rule 36.1.5.3.6 does not apply to the land. If that were the case, the filling constituted by the construction of the stopbank would be a permitted activity, subject to compliance with the rule 36.1.5.1 general conditions.

[39] In terms of a legal response to Mr Radich's proposition that it is now too late for Mr Clark to raise this issue, I consider that the essential question is whether, this matter now having been brought to the

Court's attention, it is in the interests of justice for Bryant Holdings' conviction to stand, or whether the matter should be reconsidered by the District Court.

[40] I do not think, as Mr Clark submitted, that it is a matter to be answered by reference to distinctions between questions of law and fact. In the District Court, the factual matter – namely, that the Land was within a riparian management zone – was conceded. Whether that was on the basis of an erroneous understanding of the legal position by Mr Clark, or whether it was on some other basis, is not particularly relevant. In terms of the question whether it is in the interests of justice for Bryant Holdings' conviction of an offence against s 9 to stand, I am mindful that it is a criminal offence for which Bryant Holdings has been found guilty. Furthermore, on the basis of the material placed before me there would, as I have acknowledged, appear to be a prima facie argument that the land, at least by reference to the relevant Volume Three map, is not located within a riparian management zone. I appreciate Mr Radich's point that there may be further arguments to be made, based on other specifications of riparian management zones found in the district plan, that the land is located within a riparian management zone. If, however, the land is not located within a riparian management zone when the district plan is considered in its entirety, then I do not think it would be just for the conviction against Bryant Holdings to stand.

[41] In my judgment, therefore, the appropriate course of action for me is, in terms of s 131 of the Summary Proceedings Act, to direct that the information laid against the appellant for a breach of s 9 be reheard.

[42] At that re-hearing, being in terms of s 131 a re-hearing of the whole information, the question of the appellant's compliance with the general conditions for land disturbance may also be reheard. Before me, the appellant submitted that there was no evidence at the District Court hearing that the appellant had breached those conditions. Whether such a breach had occurred was the subject of some inconclusive argument before me, again with reference being made to various materials placed before the District Court by the council. The question of the status of the land as falling within a riparian management zone having been conceded at trial, and a conviction having been entered on that basis, it was not surprising that little attention was paid in the District Court to the alternative basis upon which a breach of s 9 could have been established, namely a breach of those general conditions. It will of course be open for the district council to pay more attention to that matter in its evidence at the re-hearing.

Section 14

[43] As the attempt charge depended in particular on notice not having been given (as if it had been there would (condition (d) aside) not have been an offence), I will first consider whether the Judge was correct to conclude that conditions (a) and (d) in rule 26.1.3.2.1 were valid, and that, in any event, the appellant could not, in a prosecution, challenge the validity of those conditions. I will then consider whether the elements of

the charge of attempting to divert the Pelorus River without a resource consent were established.

Rule 26.1.3.2.1 — ultra vires conditions

[44] Mr Radich suggested that a sensible way to consider Mr Clark's challenge to the vires of conditions (a) and (d) in rule 26.1.3.2.1 was first to consider whether those conditions were, as Mr Clark argued, invalid because they in some way inappropriately qualified the otherwise permitted activity of diverting a river for the purposes of flood control (see rule 26.1.3.2). If those conditions did not fail for that reason, then it would not be necessary for the Court to consider the broader, and more difficult, question of whether, and to what extent, challenges to the validity of rules in a district plan could be made in the context of a prosecution. I note that Mr Clark, in submitting that the Judge was in error in holding that such challenges could not be made in the context of a criminal prosecution, relied on the authority of *Brader v Ministry of Transport* [1981] 1 NZLR 73 at p 80.

[45] I agree with that suggestion, and will approach the issues on that basis.

[46] As regards condition (a), Mr Clark's argument was that this condition breached s 77B because the condition did not relate to the activity itself, but rather required "a pre-activity notice on a permitted activity". Mr Clark submitted that the condition was unique, and was certainly not one that he had been able to find in any other rule in any other planning document of a similar nature. As regards the Judge's comment, that the giving of notice to the council before undertaking work could be said to be part of the activity, Mr Clark disputed that that interpretation was available. Were that to be the case, any council would be able to "pre-condition any permitted activity by requiring the person first to submit what they proposed to do to the Council". He submitted that the whole purpose of a permitted activity was that it was one that could be undertaken as of right, and did not require the person wishing to undertake that activity to deal with the council.

[47] In support of that proposition he referred to authority that, as regards a permitted activity, a council could not reserve a discretion unto itself.

[48] It is to be noted first that the condition requiring notification to the council does not reserve any discretion to the council, in that it does not require any form of subjective judgment to be made. In fact, it does not require any decision by the council at all. Rather, it simply requires that a condition be met, namely the provision of notification.

[49] Moreover, I do not consider it is necessary to read the word "conditions" in s 77B as only entitling a territorial authority to specify a condition which relates directly to the nature of the activity, as and when it is being carried out, as opposed to, in this instance, requiring the giving of notice. The giving of notice here would appear to be an administrative convenience for the council. No doubt, as submitted by Mr Radich, notice provides a basis for the council to ensure that the work, when carried out, is done so that the parameters of the permitted activity are not exceeded.

In my judgment, therefore, condition (a) of rule 26.1.3.2.1 is not ultra vires the RMA.

[50] Turning to condition (d), Mr Clark's challenge here was that the concept of adverse effect on any land owned or occupied by any other person was too uncertain as to provide the basis for an appropriate condition. I do not agree with that proposition. Whilst this condition clearly creates a high threshold, in terms of the classification of diversions that would constitute a permitted activity, it is nevertheless a clear threshold. To be a permitted activity, the diversion is not allowed to have an adverse effect on other landowners. Moreover, the fact that any effect which is adverse disqualifies the works from being permitted brings clarity to the condition. There is no value judgment to be made here, in the sense that the reservation of an essentially subjective judgment to a territorial authority in determining whether an activity is a permitted activity is not acceptable under the RMA. (See *Brookers Resource Management* para 76.10 and the cases cited there.) If there is an adverse effect, the diversion does not constitute a permitted activity and can only proceed with a resource consent.

[51] Moreover, as I indicated at the hearing of this appeal, it was not clear to me that the council had, in this prosecution, relied on there having been a breach of condition (d). Therefore, and in terms of the way the council prosecuted this offence, it was not clear to me that the appellant's challenge to condition (d) was a relevant one.

[52] I turn now to the question of the right of a defendant to raise issues of validity in a prosecution for a breach of rules in a resource management plan.

[53] That broader question is a complex one, as evidenced by the recent decision of Randerson J in *Harwood v Thames Coromandel District Council* (High Court, Hamilton A 52/02 10 March 2003, Randerson J), the two House of Lords cases, *R v Wicks* [1998] AC 92 and *Boddington v British Transport Police* [1999] 2 AC 143 referred to by Randerson J in *Harwood*, and the earlier High Court decision of Elias J, as she then was, in *Brady v Northland Regional Council* (High Court, Whangarei AP 25/95, 16 August 1996).

[54] As Randerson J put it in *Harwood* at para [20]:

> There has long been difficulty in deciding in what circumstances an accused person may be permitted to challenge the validity of subordinate legislation or an administrative act either in the context of a criminal charge or by way of a defence to a demand for payment. A challenge of this kind in criminal or civil proceedings is described as "collateral" to distinguish the challenge from one made directly, for example, in separate judicial review proceedings or in a claim for a declaration that the legislation or act in question is unlawful. As it is put in *Wade and Forsyth, Administrative Law* 8th ed; p 286, a collateral challenge, in its customary sense, refers to "challenges made in proceedings which are not themselves designed to impeach the validity of some administrative act or order".

[55] Randerson J went on to acknowledge that *Wicks* and *Boddington* had both reaffirmed the citizen's right under the rule of law to

defend proceedings by a collateral challenge to subordinate legislation, much as Elias J had found in her earlier decision in *Brady Brader,* on which Mr Clark relied, is an earlier example of the recognition in New Zealand of that general principle.

[56] As was found in *Boddington,* however, Randerson J agreed that the ability to bring a collateral challenge may be displaced by a clear parliamentary intention to the contrary. Thus, and in the context of the issues he was considering, he concluded at para [29]:

> I have concluded that the statutory context under the Dog Control Act and other statutory provisions displace the general principle that an accused person is entitled in criminal proceedings to challenge the validity or lawfulness of a public act or decision upon which his conviction depends.

[57] In light of that general authority, the issue becomes one of whether *Smith* (see above at para [23]) is, as assessed by the Judge, binding authority that the RMA demonstrates a parliamentary intention to exclude challenges to rules in district plans based not only on the proposition that the procedures in the First Schedule have not been complied with (as expressly provided in s 83), but also that (equivalent to the finding by Randerson J in *Harwood* in the context of the Dog Control Act) an accused person in criminal proceedings under the RMA is not entitled to challenge the validity or lawfulness of any public act or decision upon which his conviction depended.

[58] In *Smith* the issue, as relevant here, was whether it was open for the Judge in the District Court to traverse the issue of whether a tree (the pine tree on One Tree Hill) was validly listed as scheduled in an operative plan, in the context of a prosecution of injuring a scheduled tree. The defence had argued that there had been deficiencies in the way the council had come to "designate the tree". It had, as recorded in Fisher J's High Court decision, failed adequately to consider the tree's history, the importance of the land to Maori, and the inappropriateness of protecting this tree which was particularly offensive to Maori. Fisher J went on to record at p 33:

> Those are matters which would certainly need to be carefully considered when drawing up or reviewing the district plan. However no one was conducting that exercise on this occasion. Section 9 picks up the matter at a point which presupposes the plan's valid existence. That I think is made plain by s 76(2) which, as I said, provides that the rules in the plan are to have the force and effect of regulations. Also relevant is s 83 which provides:
>
> **83. Procedural requirements deemed to be observed** — A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with the First Schedule and shall not be challenged except by an application for an enforcement order under section 316(3).
>
> This was not an application for an enforcement order. Therefore the plan could not be challenged in these proceedings. While there may or may not be argument as to the designation of this tree in some other context, it was not

> open to the Judge to traverse that issue in the context of the prosecution before him.

[59] The Court of Appeal upheld Fisher J, on that point, in these terms at p 278:

> The third issue related to the listing or scheduling of the tree as a protected tree in the operative and proposed plans. The appellant submitted that the council had inappropriately designated the tree, which on the evidence he led, was offensive to Maori.
>
> Evidence of this kind should properly be taken into account when a district plan is prepared or reviewed. However, in agreement with the High Court, we consider that s 9 pre-supposes the valid existence of a plan or proposed plan. Section 76(2) and s 83 reinforce that conclusion. By way of answer to a prosecution for injuring a scheduled tree a defendant cannot claim that the listing process reached the wrong conclusion.

[60] As can be seen, therefore, the reasoning adopted is that s 9 presupposes the plan's valid existence. That, in turn, is said to be made plain by s 76(2) and s 83 which, in the words of the Court of Appeal, "reinforce that conclusion". As I read the Court of Appeal's decision, therefore, the principal ground for concluding that a collateral challenge is not open to a defendant in a prosecution under the Resource Management Act is that s 9, and I conclude by the same token s 14, "presuppose a plan's valid existence".

[61] On that basis, and recognising (to adopt the phrase of the Chief Justice in *Brady* at para [20]) that before me "these deep waters were hardly stirred in argument", there is clearly a basis in the *Smith* decisions for concluding – as the Judge did – that the challenges to conditions (a) and (d) proposed by Mr Clark were not matters which the Judge could properly consider in the context of a prosecution.

[62] I recognise, however, that the issue is not clear-cut. In many of the cases I have referred to there are repeated references to the significance under the rule of law of the availability of collateral challenges in criminal prosecutions under delegated legislation. I am therefore more than a little hesitant to conclude that *Smith* is, as apparently accepted by the Judge, authority for the proposition that there will be no circumstances in which a collateral challenge will be available to a prosecution under the RMA.

[63] On the basis, however, that I do not consider Mr Clark established adequate grounds to challenge conditions (a) and (d), I do not propose to take that issue any further.

Attempt

[64] Acknowledging that s 72 of the Crimes Act did apply to the RMA, and that therefore the primary argument on attempt that had been advanced in his written submissions could not prevail, Mr Clark argued at the hearing of this appeal that Bryant Holdings could not in the circumstances be guilty of an attempt.

[65] Mr Clark submitted that what Bryant Holdings had done did not constitute a criminal attempt at all, relying on *R v Donnelly* [1970]

NZLR 980 and, in particular, comments of Birkett J in *R v Percy Dalton (London) Ltd* (1949) 33 Cr App R 102, as referred to in *Donnelly*. Mr Clark's submissions addressed both what Bryant Holdings had done, and whether it had the necessary intent.

[66] Section 72 of the Crimes Act provides as follows:

> **66. Attempts** — (1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
>
> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit to, is a question of law.
>
> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[67] On the basis of the approach taken by s 72 to the offence of an attempt, I think it is appropriate to consider first the question of intention (subs (1)), and then to consider the question of whether what Bryant Holdings did was capable of constituting an attempt (subss (2) and (3)).

Bryant Holdings' intention

[68] In addressing the issue of intention Mr Clark, as I understood it, suggested that the intent that had to be proved was that, knowing it needed a resource consent and with the knowledge that it did not have one, Bryant Holdings proceeded to build the stopbank without any intention of obtaining such a resource consent prior to the river actually being diverted. In other words, if a person had built a stopbank, knowing they needed a resource consent and knowing that they did not have one, but intending to obtain that resource consent before a flood was likely to occur, then such a person could not be convicted of the offence of attempting to divert the waters of the river without a resource consent. Mr Clark framed these submissions in the more general context of there being a lack of authority as to the intent required under s 72 where the attempt is to perform an offence of strict liability.

[69] Further, I took Mr Clark's submission to be that, on the basis of the transcript of the hearing before the Judge and of his decision on conviction, the Crown had not separately addressed the need to prove intent. Therefore that element of the case had not been established.

[70] As regards Mr Clark's basic submission, that s 72(1) requires, even where an attempt is to commit a strict liability offence, the establishment of intent, I accept that proposition. The question, in my judgment, is what is the intent that is required to be established here. Having regard to the elements of the offence under s 14, it is in my judgment necessary for the Crown to prove to the satisfaction of the Judge beyond reasonable doubt that the appellant intended by its action of constructing the stopbank to divert the waters of the Pelorus River knowing that, as a matter of fact, it did not have a resource consent and knowing that, again as a matter of fact, it had not notified the council of

the proposed action. It is not, in my judgment, necessary for the Crown to establish that the appellant knew it required a resource consent, in the absence of notifying the council. On an attempt, as for a substantive offence, ignorance of the law provides no defence. Moreover, and responding to Mr Clark's argument, although there was no evidence before the Court at the original hearing on any of these issues, it would not be a defence for the appellant to establish that, in some way, it had intended to apply for, and expected to receive, a resource consent before it anticipated that the Pelorus River would flood and thereby be diverted. If evidence was provided that that was the state of mind of the appellant, that would be relevant in terms of culpability and sentencing. It would not, in my judgment, provide a defence to the charge of attempt.

[71] Mr Radich did not dispute the proposition that it was necessary to establish intention. His submission was that the appellant had:

(a) plainly formed the intent to divert water; and
(b) plainly proceeded knowingly without the requisite authority, and had completed the work so that everything was in place to produce a diversion as soon as the water levels had risen.

This was, therefore, clearly an attempt.

[72] In terms of the Court's consideration of the question of intent Mr Radich was, as I understand matters, principally relying on comments that the Judge made at the time of sentencing. In his sentencing notes, and addressing issues of culpability, the Judge commented as follows at paras [7] and [8]:

> In terms of the attitude of the defendant, I must accept the proposition that nobody who is involved in the farming industry alongside a river and who has a relationship with the contractor who did the work, could not [sic] possibly have done this without turning their minds to the possibility that at the very least a resource consent was required. Indeed the evidence here is that Mr Bryant approached the Council about the possibility of a stopbank being constructed. He was told that no funding existed for the Council to do and that if a stopbank was to be constructed, it would have to be at his company's cost. A deliberate choice was made to do that.

I need to accept as a matter of logic that that cannot have been done without the turning of minds to the possibility of a resource consent being required, and that a choice was made to do the work and, if there were to be consequences, they would be faced later.

[73] I accept Mr Radich's submission that, in this paragraph, the Judge was commenting on the state of mind of Bryant Holdings. Nevertheless, the Judge's decision – that is, his reasons for conviction – do not reflect him, in arriving at his decision to convict, having turned his mind to the need for him to be satisfied beyond reasonable doubt that Bryant Holdings had the relevant intent that I have, at para [72], found is required.

[74] I am therefore not satisfied that, in terms of the elements of the offence itself, the need for an intent of the type I have found to be

necessary to be established beyond reasonable doubt was considered and determined by the Judge.

[75] In reaching that conclusion, I make no criticism of the Judge. As I have set out above, this appeal has been argued on a completely different basis than the case was argued before the Judge and, in particular, in terms of the way in which Bryant Holdings defended itself in the District Court.

Bryant Holdings' actions

[76] Mr Clark relied on *R v Donnelly* in support of his proposition that, as a resource consent was ultimately granted prior to any water having been diverted and therefore an actual offence occurring, what had been done could not be said to have been an attempt. In this, he relied specifically on the following comment of Birkett J in the English case *R v Percy Dalton (London) Ltd* where, as quoted in *R v Donnelly,* Lord Birkett at p 110 said as follows:

> Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.

[77] Mr Radich's submission, as regards the actus reus of the offence, was that Bryant Holdings had completed the construction of the stopbank so that everything was in place to produce a diversion of water as soon as water levels had risen to the relevant point. Bryant Holdings had done everything necessary to achieve a diversion of floodwater, and all that was required was the appropriate weather conditions.

[78] I note that *R v Donnelly* is, itself, of little assistance to the applicant. *R v Donnelly* is authority for the proposition that if it is in the relevant circumstances legally impossible for a crime to be committed, a person cannot be guilty of an attempt. Thus, in *Donnelly* a conviction for "attempted receiving" was set aside on the basis that the goods that were the subject of the attempt had already been returned to their owner. That principle itself has no application to the present proceeding. If sufficient rain had fallen and the waters of the Pelorus River had been diverted, without a resource consent having been obtained, the offence would have occurred. In my view, therefore, no question of impossibility, legal or otherwise, arises. As regards the passage of Lord Birkett from *Dalton*, Mr Clark's argument appeared to be that, because Bryant Holdings subsequently obtained a resource consent, and that therefore there had been no unlawful diversion, what Bryant Holdings had done could not constitute an attempt.

[79] The cases on attempt reflect the undoubted complexity of this area (see commentary in *Adams on Criminal Law* at para 72.05 and following referring to cases such as *R v Burrett (No 2)* (High Court, Wellington T 3347/02, 13 February 2003, Hammond J); *R v B (No 5)* (High Court, Christchurch T19/01, 7 September 2001, William Young J); *R v Yen* [2007] NZCA 203).

[80] The issue of whether what a charged person has done constitutes an attempt involves an often difficult assessment as to whether an act is sufficiently proximate to constitute an attempt. That is, whether the conduct in question is sufficient in law to amount to an attempt – whether it goes beyond mere preparation and constitutes the necessary substantial step towards the commissioning of the offence (see *Police v Wylie* [1976] 2 NZLR 167 and cases cited above at para [81]).

[81] Here, in my judgment, Bryant Holdings' actions can properly be characterised as a substantial step in the commissioning of the offence. Its actions were more than merely preparatory. The construction of the stopbank without notice to the council was, as a matter of fact, a substantial undertaking and, in terms of the elements of the offence (questions of intent and the subsequent obtaining of resource consent aside), required only the water levels of the Pelorus River to rise for the offence to be completed. On that basis, I conclude that what Bryant Holdings did in constructing the stopbank was sufficient, at law, to constitute the actus reus of an attempt to divert the Pelorus River.

[82] Bryant Holdings had, in fact, done all that was necessary for it to do for the offence to be completed. In order for the offence to actually occur, all that was required was for there to be sufficient rain to raise the levels of the Pelorus River so that the stopbank came into play. There was no further step which Bryant Holdings could have taken to bring about that natural event.

[83] That analysis is, I think, consistent with the approach taken by the Court of Appeal in *R v Yen* (above). To adopt this approach is not to suggest that a "last act" test should be adopted as the sole test to determine whether conduct is sufficient to amount to an attempt. Nevertheless, in certain circumstances such an approach will recognise acts that should be classified as attempts. In my view the last act test can be a sufficient, even if not a necessary, basis for attempts of liability, as acknowledged by Simester and Brookbanks *Principles of Criminal Law* (3rd ed, 2007) p 233.

[84] Taking the necessary elements of mens rea and actus reus together, in terms of the charge of attempting to divert the waters of the Pelorus River without a resource consent, in my judgment proof of the intent I have referred to at para [72], together with proof of the fact of the construction of the stopbank by the appellant and of the lack of notice to the Council, are what is necessary to establish the elements of the offence with which the appellant is charged.

[85] On that basis, while the elements of actus reus were established, I am not persuaded the same conclusion can be reached as regards mens rea. I again conclude that the appropriate response to Bryant Holdings' appeal is to remit the information for attempting to divert the Pelorus River without resource consent for rehearing in the District Court. That rehearing should be conducted on the basis of my findings in this decision.

Appeal as to sentence

[86] Mr Clark challenged both sentences as being manifestly excessive. He did so in general terms, and without reference to any

particular similar case on the basis of which he could support his argument.

[87] Having considered a number of cases in this area – for example *Northland Regional Council v United Carriers Ltd* (District Court, Whangarei CRN 04088500926 & others, 12 October 2005) and *Southland Regional Council v Houkura Co Ltd* (District Court, Invercargill, CRN 1025007486, 21 November 2001, Judge Thompson) and in the absence of Mr Clark having provided me with any contrary authority, in my judgment he did not establish his proposition that the sentences imposed were, as he asserted, manifestly excessive.

[88] As there are to be rehearings of both informations, I therefore restrict my comments on the sentence appeal to the following point. As Mr Clark noted, where there is a conviction for an attempt, s 311 of the Crimes Act 1961 provides that the maximum penalty is one-half of the maximum penalty that would apply to the substantive offence. I draw this matter to the attention of the District Court Judge as, in terms of his approach to sentencing at the original hearing, this matter would appear to need consideration in terms of the relationship between any fine under s 9, if the substantive charge under s 9 is proven, relative to a fine for an attempt to commit an offence under s 14, if that charge is proven.